

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE
OF JOHN LEWIS TILLER, DECEASED, PETI-
TIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 10, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH DISTRICT

ATLANTIC COAST LINE
RAILROAD COMPANY, a
Virginia corporation, Plaintiff,

v.

HATTIE MAE TILLER,
Executor of the Estate
of John Lewis Tiller,
Deceased, Defendant.

No. 5217

STIPULATION

It is hereby stipulated by and between counsel for the parties herein that, since the portions of the certified transcript of record designated by appellant herein to be printed as an appendix to its brief incorporate certain portions of the certified transcript of record which the appellee desires to be printed as an appendix to its brief, the parties hereto agree to print the following as a "Joint Appendix" to the briefs of both parties herein.

Dated at Richmond, Va., this 27th day of January, 1944.

J. VAUGHAN GARY,

Counsel for Appellee.

COLLINS DENNY, JR.,

Counsel for Appellant.

**JOINT APPENDIX TO BRIEFS OF APPELLANT
AND APPELLEE**

**IN THE
United States Circuit Court of Appeals
FOURTH CIRCUIT**

No. 5217

**ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, APPELLANT,**

v.

**HATTIE MAE TILLER, EXECUTOR OF JOHN
LEWIS TILLER, DECEASED, APPELLEE.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION.**

COMPLAINT

(Filed January 17, 1941)

1. Plaintiff is and has been duly appointed, qualified and acting executor of the Estate of John Lewis Tiller, Deceased, who died on March 21, 1940, as the result of injuries sustained as hereinafter described.

2. Before and at the time of the injuries sustained by plaintiff's decedent resulting in his death, all of which is herein complained of, defendant owned and operated a railroad extending through the State of Virginia and several

other states and was a common carrier engaged in commerce between the several states, territories, District of Columbia, and foreign nations; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was employed by defendant in such commerce, his duties being in furtherance of interstate and foreign commerce and directly, closely and substantially affecting such commerce. This action is brought by plaintiff for the benefit of the surviving widow and minor child, the dependents of the decedent, under and pursuant to the provisions of 45 U.S.C.A. Section 51-60, and acts amendatory thereto, known as the Federal Employers Liability Act.

2. On or about March 20, 1940, the defendant was engaged in shifting, coupling, and uncoupling cars from one train to another on its tracks in or about the South Richmond stockyards near Clopton Road, Stop 5, Petersburg Pike, Chesterfield County, Virginia, in order to make up the cars for a southbound freight train.

3. While defendant was thus engaged, plaintiff's decedent was performing his duties as an employee of defendant and was inspecting the seals on various freight cars and performing other services.

4. Defendant's officers, agents and servants, other than plaintiff's decedent, acting within the scope of their employment, then and there performed the operations in which they were engaged in a careless, reckless, unlawful and negligent manner in that while they knew or in the exercise of ordinary care should have known full well the position of the decedent and the work in which he was engaged, they failed to keep a proper lookout for him, to give proper signals warning of the approach of the train, to keep the head car properly lighted, or lighted at all, to warn deceased of a hitherto unprecedented and unexpected change in the manner of shifting the cars although they knew full well that such a change would place him in a position of extreme danger, if he were not so warned, to operate their train, engine and cars in a careful and prudent manner under the

circumstances then and there existing, to furnish deceased a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of all of which a car propelled by defendant's engine and operated by its crew ran up against, struck, dragged, ran over, crushed and mangled decedent, causing him severe and grievous injuries from which he suffered excruciating agony and pain for many hours during which he was conscious until his resulting death on March 20, 1940. After the deceased was thus injured, bleeding profusely and in a severely critical condition, defendant's servants, agents, officers and employees did not exercise ordinary care in providing prompt and adequate medical treatment and attention for deceased, but on the contrary carelessly and negligently left deceased for some hours unattended by medical doctors and hospitals and failed to procure an ambulance, all of which caused great loss of blood and suffering to deceased, and all of which failures to exercise ordinary care in an emergency contributed to his death. Prior to these injuries, decedent was a strong, able-bodied man capable of earning and actually earning \$185.00 a month. At the time of his death, he was fifty-one (51) years of age. Decedent's dependents, who are his widow and minor child, have also suffered great pecuniary loss and damage as a result of his fatal injuries and death.

5. This action is commenced within one year from the date of decedent's fatal injuries.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of FIFTY THOUSAND (\$50,000.00) DOLLARS and costs.

ANSWER

(February 6, 1941)

FOR A FIRST DEFENSE.

(a) The defendant admits the allegation of paragraph one of the Complaint.

(b) Defendant admits that it is a common carrier by railroad, engaged in interstate commerce; it admits that the injuries complained of occurred while defendant was engaged in such commerce and while plaintiff's decedent was employed by it in such commerce.

(c) Defendant alleges that at or about 7 P. M. o'clock on March 21, 1940, it was engaged in shifting, coupling and uncoupling cars from one train to another and from one track to another on its tracks in its railroad yards just south of the City of Richmond, in Chesterfield County, Virginia, known as Clopton Yards, in order to make up a regular southbound freight train. One of the regular duties of plaintiff's decedent was to ride and protect said southbound freight train. Defendant is without knowledge sufficient to permit it to affirm or deny whether at the time plaintiff's decedent received the injuries of which complaint is made, he was inspecting the seals on the various freight cars, or was actively performing other services, or was preparing to perform services. Defendant, on the other hand, avers that there were no eye-witnesses to the accident on which plaintiff's decedent was killed; that whether he was killed in alighting from a moving train and stepped immediately in the path of a cut of cars moving in the opposite direction, or whether he was standing upon the tracks upon which said cut of cars was approaching, or whether he had fallen upon said tracks from a moving car before he was struck by said cut of cars are all matters of speculation, guess and random judgment, and can form no basis for legal liability.

(d) Defendant admits that while it was thus making up said southbound freight train, plaintiff's decedent was struck by a moving cut of cars in the said railroad yard, but it denies that it, its officers, servants or employees other than the plaintiff's decedent were guilty of any negligence whatsoever in the premises, and it denies each and every allegation of negligence contained in paragraph four of the Complaint.

FOR A SECOND DEFENSE.

Defendant alleges that plaintiff's decedent assumed all risks normally and necessarily incident to his employment. He knew that the shifting of cars and the making up of a train in a railroad yard after dark is attended by much danger, and the risks normally and necessarily attendant on such operations were assumed by plaintiff's decedent. The injuries and death of plaintiff's decedent were the proximate result of a risk thus assumed by him.

FOR A THIRD DEFENSE.

While defendant denies that its officers, servants or employees other than plaintiff's decedent were guilty of any negligence whatsoever, nevertheless, defendant alleges that if plaintiff's decedent was negligently injured as alleged in the Complaint, the plaintiff's decedent, himself, was guilty of contributory negligence in that, knowing that he was at work in a place of continual danger, he failed to keep a proper lookout for his own protection and failed to heed the approach of cars being moved by an engine, but, on the contrary, carelessly and negligently permitted himself to be struck by a car so propelled, and that this negligence on the part of plaintiff's decedent proximately contributed to his injuries and death; or that plaintiff's decedent negligently alighted or fell from a moving train immediately in the path of a cut of cars moving in the opposite direction.

ORDER FILING AMENDED COMPLAINT

(Entered and filed June 1, 1943)

This day came the plaintiff, by counsel, and moved the Court for leave to file her amended complaint in this action, which motion was opposed by defendant upon the ground that the allegation of a violation of the Boiler Inspection Act (45 U. S. C. A., Section 22, *et seq.*), made in the amended complaint, raises as a ground of action a new and different state of facts from those alleged in the original complaint;

seeks to introduce a new cause of action; and seeks a departure from law to law; all after the expiration of the limitation period of three years prescribed by the Federal Employers Liability Act (45 U. S. C. A., Section 56); and upon the further ground that said limitation is a limitation on the right of action itself and the Court is accordingly without jurisdiction to allow the amendment, and was argued by counsel.

The Court being of the opinion that the ends of justice require that leave to file said amended complaint be given, it is ordered that the amended complaint of the plaintiff be filed herein, leave being given to defendant to file such responses to said amended complaint within twenty days from this date, as it may be advised.

NOTICE TO FILE AMENDED COMPLAINT

(Filed June 1, 1943)

To Collins Denny, Jr., Esq.,
Travelers Building,
Richmond, Virginia.

Dear Sir:

Please take notice that I shall move this Court at the Federal Court Room, United States Post Office Building, Richmond, Virginia, on the 28th day of May, 1943, at ten o'clock in the morning of that day, or as soon thereafter as I may be heard, for leave to file the attached amended complaint.

J. VAUGHAN GARY,
Of Counsel for Plaintiff,
State-Planters Bank Building,
Richmond, Virginia.

Due, legal and timely service of the above notice is hereby accepted and acknowledged this 24 day of May, 1943.

COLLINS DENNY, JR.,
Of Counsel for Defendant.

AMENDED COMPLAINT

(Filed June 1, 1943)

1. Plaintiff has been duly appointed, has qualified and is now acting as Executor of the Estate of John Lewis Tiller, deceased, who died on March 22, 1940, as the result of injuries sustained as hereinafter described.

2. Before and at the time of the injuries sustained by plaintiff's decedent resulting in his death, which is the subject of this complaint, defendant owned and operated a railroad extending through the State of Virginia and several other States and was a common carrier engaged in commerce between the several States, Territories, District of Columbia, and foreign nations; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was employed by defendant in such commerce, his duties being in furtherance of interstate and foreign commerce and directly, closely and substantially affecting such commerce. This action is brought by plaintiff for the benefit of the surviving widow and minor child, the dependants of the decedent, under and pursuant to the provisions of 45 U. S. C. A., Section 51-60, and acts amendatory thereto, known as the Federal Employers Liability Act.

3. On or about March 20, 1940, the defendant was engaged in coupling, uncoupling and shifting cars from one train to another on its tracks in or about its yard at or near the South Richmond stockyards near Clopton Road, Stop 5, Petersburg Pike, Chesterfield County, Virginia, in order to make up the cars for a southbound freight train.

4. While defendant was thus engaged, plaintiff's decedent was performing his duties as an employee of defendant and was inspecting the seals on various freight cars and performing other services.

5. Defendant then and there violated the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A., Section 22,, *et seq.*, by using or permitting to be used a locomotive which

was in improper condition and unsafe to operate in the service, and the condition of which constituted unnecessary peril to life and limb, in that it did not have the proper lights; and defendant then and there also violated the rules and regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of the said Federal Boiler Inspection Act in that it used a locomotive in yard service between sunset and sunrise which did not have the proper lights as prescribed by the said rules; and the defendant's officers, agents and servants, other than plaintiff's decedent, acting within the scope of their employment, then and there performed the operations in which they were engaged in a careless, reckless, unlawful and negligent manner in that while they knew, or in the exercise of ordinary care should have known full well, the position of the decedent and the work in which he was engaged, they failed to keep a proper lookout for him, to give proper signals or warnings of the approach of the train, to keep the locomotive and/or the head car properly lighted, or lighted at all, to warn decedent of a hitherto unprecedented and unexpected change in the manner of shifting the cars, although they knew full well that such a change would place him in a position of extreme danger, if he were not so warned, and failed to operate their train, locomotive and cars in a careful and prudent manner under the circumstances then and there existing, and to furnish decedent a properly lighted and a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of all of which violations of law and negligence on the part of the defendant and its said officers, agents and servants, a car propelled by defendant's said locomotive and operated by its crew ran up against, struck, dragged, ran over, crushed and mangled decedent, causing him severe and grievous injuries from which he suffered excruciating agony and pain for many hours during which he was conscious until his resulting death on March 22, 1940. Prior to these injuries, decedent was a strong, able-bodied man capable

of earning and actually earning \$185.00 a month. At the time of his death, he was fifty-one (51) years of age. Decedent's dependents, who are his widow and minor child, have also suffered great pecuniary loss and damage as a result of his fatal injuries and death.

6. This action is commenced within one year from the date of decedent's fatal injuries.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of FIFTY THOUSAND (\$50,000.00) DOLLARS and costs.

ANSWER TO AMENDED COMPLAINT

(Filed June 18, 1943)

FOR A FIRST DEFENSE.

Defendant says that the allegations of the first two clauses of paragraph 5 of the Amended Complaint, to-wit, the clauses reading as follows:

"5. Defendant then and there violated the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A., Section 22, *et seq.*, by using or permitting to be used a locomotive which was in improper condition and unsafe to operate in the service, and the condition of which constituted unnecessary peril to life and limb, in that it did not have the proper lights; and defendant then and there also violated the rules and regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of the said Federal Boiler Inspection Act in that it used a locomotive in yard service between sunset and sunrise which did not have the proper lights as prescribed by the said rules;"

seek to introduce new subject matter as a new cause of action; raise as a cause of action a new and different state of facts from those alleged in the original complaint; seek a departure from law to law; all after the expiration of

the limitation period of three years prescribed by the Federal Employer's Liability Act, as amended August 11, 1939 (45 U. S. C. A., Section 56); defendant says that said Statute, as amended, establishes as a condition precedent that action be brought within the period of three years and said limitation is a limitation on the right of action itself, and this Court is without jurisdiction to consider this new subject matter and this new cause of action.

WHEREFORE, defendant moves to strike said allegations from the Amended Complaint and to dismiss this new alleged cause of action. And, as permitted by Rule 12 (b) of the Federal Rules of Civil Procedure, defendant incorporates this defense and motion in its answer.

FOR A SECOND DEFENSE.

Defendant says that the first two clauses of paragraph 5 of the Amended Complaint, quoted in the first defense, seek to introduce new subject matter as a cause of action; raise as a ground of action a new and different state of facts from those alleged in the original complaint; seek a departure from law to law, all after the expiration of the limitation period of three years prescribed by the Federal Employer's Liability Act, as amended (45 U. S. C. A., Section 56). Any right of action predicated on this new state of facts is, accordingly, barred.

WHEREFORE, defendant moves to strike said allegation from the Amended Complaint and to dismiss this new alleged cause of action.

FOR A THIRD DEFENSE.

1. Defendant admits the allegations of paragraph 1 of the Amended Complaint.

2. Defendant admits the allegations of paragraph 2 of the Amended Complaint.

3. Defendant admits the allegations of paragraph 3 of the Amended Complaint.

4. Defendant is without knowledge sufficient to permit it to affirm or deny whether at the time plaintiff's decedent received the injuries of which complaint is made, he was inspecting the seals on the various freight cars, or was actively performing other services, or was preparing to perform services. Defendant, on the other hand, avers that there were no eye-witnesses to the accident in which plaintiff's decedent was killed; that whether he was killed in alighting from a moving train and stepped immediately in the path of the cut of cars moving in the opposite direction, or whether he was standing upon the tracks upon which said cut of cars was approaching, or whether he had fallen upon said tracks from a moving car before he was struck by said cut of cars are all matters of speculation, guess and random judgment, and can form no basis for legal liability.

5 (a) The first two clauses of paragraph 5 of the Amended Complaint, quoted in the first defense, alleged, for the first time, a cause of action which did not accrue within three years next before the commencement of action on that cause of action.

5 (b) Defendant admits that while it was making up its southbound freight train on the evening in question, plaintiff's decedent was struck by a moving cut of cars in defendant's Clopton Yards, but it denies that it, its officers, servants or employees violated the provisions of the Federal Boiler Inspection Act (45 U. S. C. A., Sec. 22, *et seq.*) or that it violated the Rules and Regulations prescribed by the Interstate Commerce Commission, pursuant to the provisions of said Federal Boiler Inspection Act, in the respects alleged; it says that if in any of the respects alleged it violated said last mentioned Act or said Rules and Regulations, there was no causal connection between such violation and injuries sustained by plaintiff's decedent and his death; and it denies that it, its officers, servants or employees, other than plaintiff's decedent, were guilty of any negligence whatsoever in the premises, and it denies each and every allegation of negligence contained in paragraph 5 of the Amended Complaint.

6. Defendant denies that this action, so far as it relates to any cause of action for a violation of the provisions of the Federal Boiler Inspection Act, or for a violation of any Rule or Regulation prescribed by the Interstate Commerce Commission, pursuant to the provisions of said Act, was commenced within one year from the date of decedent's fatal injury.

FOR A FOURTH DEFENSE.

While defendant denies that its officers, servants or employees, other than plaintiff's decedent, were guilty of any negligence whatsoever, nevertheless, defendant alleges that if plaintiff's decedent was negligently injured, as alleged in the Amended Complaint, plaintiff's decedent, himself, was guilty of contributory negligence in that, knowing that he was at work in a place of continual danger, he failed to exercise reasonable care in keeping a proper lookout for his own protection and failed to exercise reasonable care in heeding the approach of cars being moved by an engine, but, on the contrary, carelessly and negligently permitted himself to be struck by a car so propelled; and that this negligence on the part of plaintiff's decedent proximately contributed to his injuries and death; or that plaintiff's decedent negligently alighted or fell from the moving train immediately in the path of the cut of cars moving in the opposite direction; or that plaintiff's decedent negligently fell or slipped while trying to board the car by which he was struck.

MOTION TO STRIKE DEFENSES

The plaintiff moves the Court as follows:

1. To strike out the first and second defenses and paragraphs 5(a) and 6 of the third defense asserted by defendant in its answer to the amended complaint heretofore filed herein upon the grounds that they fail to state legal defenses; that plaintiff's amended complaint does not seek

to introduce new subject matter as a cause of action, raise as a ground of action a new and different state of facts from those alleged in the original complaint or seek a departure from law to law; that no right of action asserted in the amended complaint is barred by any statute of limitation; that any and all claims asserted in the amended complaint arose out of the conduct, transaction or occurrence set forth in the original complaint and the amendment relates back to the date of the original complaint; and that the subject matter and state of facts to which defendant objects in his answer were presented and argued by counsel for the plaintiff and counsel for the defendant in briefs filed herein before the Supreme Court of the United States within three years from the day the cause of action alleged by the plaintiff accrued.

2. To strike out the fourth defense asserted by the defendant in its said answer upon the ground that it fails to state a legal defense; and that the violation by the defendant of the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A., Section 22, *et seq.*, a statute enacted for the safety of employees, contributed to the injury and death of plaintiff's decedent and bars the defendant from asserting the alleged contributory negligence of the plaintiff's decedent as a defense.

MEMORANDUM OPINION OF THE COURT

(Filed July 23, 1943)

After careful consideration of the oral and written arguments of counsel, I have concluded that the motions of the defendant to strike those portions of the amended complaint which allege violations of the Federal Boiler Inspection Act and rules and regulations prescribed by the Interstate Commerce Commission, should be overruled.

The Federal Employers Liability Act gives to employees of common carriers by railroad engaged in interstate commerce a cause of action against such carrier for damages

for injury or death resulting from the negligence of any employee of any such carrier or from any defect or insufficiency, due to negligence, in its cars, engines or other equipment. The original complaint states that the action is brought under and pursuant to said Act. Under the circumstances, the original complaint asserted a cause of action as broad as that given by the Act under which the complaint was filed, and the plaintiff became entitled to invoke the negligence specified in the Act, whether that of the employees of the carrier or that arising by reason of any defect in its equipment. And the cause of action asserted in the original complaint is not to be restricted by statements made in the complaint which are not only unnecessary to a statement of the cause of action but might have been omitted altogether until the plaintiff might have been required to make a more definite statement of the acts of negligence relied upon for a recovery.

My conclusions are that the cause of action conferred upon the plaintiff by the Federal Employers Liability Act was invoked in her original complaint; that the amended complaint does not state a new or different cause of action from that asserted under the original complaint; that the new or added portions of the amended complaint merely amplify the particulars of negligence which were unnecessarily placed in the original complaint; and that the motions of the defendant to strike certain portions of the amended complaint should be overruled.

A sketch of an order carrying out the views here expressed may be presented after reasonable notice.

**ORDER OVERRULING DEFENDANTS MOTION TO
STRIKE CERTAIN PORTIONS OF
AMENDED COMPLAINT**

(Entered and filed August 17, 1943)

Upon consideration of defendant's motions set forth in the first and second defenses of its answer to plaintiff's

amended complaint to strike certain portions of said complaint, the Court, having considered the oral and written arguments of counsel, being of the opinion that plaintiff's amended complaint does not state a new or different cause of action from that asserted under the original complaint, and that the new or added portions of the amended complaint merely amplify the particulars of negligence which were unnecessarily placed in the original complaint, it is ordered that the said motions of the defendant be overruled, and the Court being further of the opinion that plaintiff's motion to strike paragraphs 5 (a) and 6 of defendant's third defense should be granted, it is ordered that paragraphs 5(a) and 6 of defendant's third defense be stricken from its answer to plaintiff's amended complaint.

And plaintiff, having moved that she be permitted to withdraw her motion to strike the fourth defense set up in the amended answer, she is permitted to withdraw the same, leave being given to the plaintiff to renew the said motion or otherwise to raise the said question, if, in the future, she be so advised.

REPORTERS TRANSCRIPT

MRS. HATTIE MAE TILLER, the plaintiff, being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

Q. Mrs. Tiller, are you the wife of John Lewis Tiller?
A. Yes.

Q. When were you married? A. November 22, 1930.

.

Q. Have you any children, Mrs. Tiller? A. Yes, sir, one.

Q. A boy or girl? A. A boy.

.

Q. How old is he? A. Eight years old.

Q. By whom was your husband employed? A. By the Atlantic Coast Line Railroad.

Q. How long had he been employed by that company?
A. Sixteen years.

Q. What was his assignment or title, if any, with the company? A. Sergeant of Police.

Q. What was the date of his death? A. March 22, 1940.

Q. Where did he die? A. In Grace Hospital.

Q. Do you recall what time he left his home on the day of March 20, 1940? A. About six o'clock.

Q. Morning or evening? A. Evening.

Q. When and where did you see him next? A. I saw him in Grace Hospital next. I was called on the evening of March 20th about 8:30, saying that my husband had been badly hurt on the road.

Q. Did you go to the hospital? A. I went to the hospital immediately and his condition was such that night that they did not permit me to see him.

Q. When did you see him the next time after he left home? A. I saw him the following morning.

Q. Was he conscious? A. Yes, he was conscious and suffering intensely, I should say.

.

Q. Was that before or after the amputation of his leg?
A. That was after the amputation of his leg because he told me they had amputated his leg.

Q. Did you see him after the second operation, Mrs. Tiller? A. Yes.

Q. Was that after a further amputation? A. That was after they had amputated his arm.

Q. What was the state of your husband's health previous to this accident? A. It was very good.

Q. His hearing? A. Very good.

Q. How about his sight? A. Very good.

Q. Was he a man addicted to strong drink? A. Not at all. He did not drink.

Q. Was he a large or small man? A. He was a large man.

Q. Do you recall what his weight was? A. It was around 200.

Q. What was his height? A. Six feet.

Q. Tell the Jury, Mrs. Tiller, what was your husband's age in 1940, March 20th? A. He was fifty-one.

Q. Do you know his birthday? A. July 13, 1888.

.

Q. Is this the flashlight that belonged to your husband? I hand it to you, Mrs. Tiller, and ask you if you can identify it as a flashlight belonging to your husband?

.

(The flashlight was filed and marked Plaintiff's Exhibit No. 1)

By MR. SATTERFIELD:

Q. When Mr. Tiller usually went out on this run what time would he return home? A. Around five o'clock in the morning.

Q. Was his work regular, the assignment that he had on the railroad company? A. Well, his work was irregular but he had been on this run the greater part of the years he had been with them.

.

Q. Mrs. Tiller, will you please tell the gentlemen of the jury what was the salary or the remuneration which the Coast Line paid your husband monthly? A. \$185.00 a month.

Q. Was he made by the company any allowances for expenses? A. Yes, he had an expense account.

Q. Do you know what that amounted to monthly? A. That amounted to anywhere from \$18 to \$25, I should say.

.

Q. Was that in addition to his salary? A. Yes.

Q. So he received either \$185 a month plus \$18 or some months \$185 a month plus \$25? A. Yes.

Q. And I imagine sometimes in between? A. Yes.

Q. What did he contribute to the support of you and your

infant child? A. Well, he gave us practically everything he made except what he actually needed.

Q. Could you give the jury some idea as to what figure he contributed each month? A. I should say approximately \$150.

Q. You qualified as the executor of the estate of your husband, did you not? A. Yes.

Q. And you are the plaintiff in these proceedings? A. Yes.

CROSS EXAMINATION

By MR. DENNY:

Q. Mrs. Tiller, the expense account to which you referred, I take it, covered his meals and his lodging and other expenses while away from home? A. Yes.

Q. It was simply a reimbursement of money he had to spend? A. Yes.

REDIRECT EXAMINATION

By MR. SATTERFIELD:

Q. You stated a moment ago that you were at the hospital all the time he was there. Did you see him from time to time while he was there? A. Yes, I saw him all the time he was in the hospital but I couldn't go in. I would just go to the room and look in.

Q. How many times did you go in and talk to him? A. I only talked to him twice.

Q. Those occasions were when? A. Well, the morning after he was hurt was the first time and he was too ill all day to talk to him and I talked to him that night. He was conscious that night as late as twelve o'clock.

Q. Was he suffering at that time? A. Yes indeed, and he knew me as late as twelve o'clock that night and called my name.

DR. J. F. PARKINSON, called as a witness by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. GARY:

Q. Dr. Parkinson, are you a practicing physician? A. Yes.

Q. Were you connected with Grace Hospital on March 20, 1940? A. Yes.

Q. In what capacity? A. As interne.

Q. Did you see Mr. John Lewis Tiller who was brought into the hospital that night? A. Yes, sir.

Q. Do you have with you the charts from the hospital showing his condition and the treatment? A. Yes.

Q. Did you examine Mr. Tiller when he was brought in? A. Yes.

Q. Will you state to the jury what his condition was when he was brought into the hospital? You may refer to the chart of the hospital and any notes that were made with reference to it. First, will you state what time he was brought into the hospital? A. Mr. Tiller was admitted to the hospital, according to the record, at 8:10 p. m. on March 20, 1940. I saw him on admission. At that time he was in much pain and in extreme shock and the people who brought him in in an ambulance stated that he was struck by a train just prior to admission. He was a well developed and well nourished white male of approximately fifty-two years of age, in extreme shock and in extreme pain and bleeding from compound fractures of left arm and left thigh. His head and neck showed nothing except bruises about the face and head. He had what I interpreted as fractures of the left ribs which were not causing any extreme difficulty at that time. Otherwise his body was in fairly good condition except for his extremities which showed compound fracture of the left thigh with almost complete section of the vessels, nerves and muscles. This was in the lower third of his thigh above his knee. He also had compound fractures of the left arm just above the elbow and this compound fracture also had destroyed the majority of the tissue beneath the skin.

At 11 o'clock his condition had improved somewhat so that he could be removed to the operating room and in the operating room Dr. Beath, who was the surgeon attending Mr. Tiller, amputated his left thigh and reduced the fracture of the right ankle and cleaned the lacerations of his left arm.

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A. Yes. Following that a blood transfusion was given and Mr. Tiller was returned to bed. The left arm was only cleaned to remove the tissue which was contaminated at that time. No extensive operation was done on the left arm due to his physical condition.

The next day he was returned to the operating room and at that time the left arm was amputated above the elbow and at the same time we redressed the stump of his left thigh amputation and on redressing in the operating room there was a small amount of discharge and a faint foul sweet odor which suggested the possibility that he was getting gas gangrene infection in this thigh.

After the first operation he was given the usual anti-gas serum and treatment for tetanus. As soon as we found some suspicion of gas gangrene we immediately started therapeutic doses of the serum for gangrene and as soon as his nausea was over we started him on sulfanilimide.

He received three blood transfusions during the period he was in the hospital. Then Mr. Tiller's condition grew much worse in the afternoon after his arm was amputated, his temperature began to rise rapidly and he seemed to be in very poor condition. This continued down hill until 4:45 A. M. of the 22nd of March when Mr. Tiller ceased to breath.

Q. He died on March 22nd at 4:45 A. M.?

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MR. SATTERFIELD: At this point we should like to offer in evidence the photograph which I hand counsel for the defense.

MR. DENNY: That is agreed.

MR. SATTERFIELD: And to have it marked Plaintiff's Exhibit No. 2.

(This photograph was filed and marked Plaintiff's Exhibit No. 2)

MR. SATTERFIELD: We also ask at this time to introduce in evidence the rules of the Interstate Commerce Commission which, by stipulation and agreement, counsel for the defense have agreed we might introduce.

MR. DENNY: Do you desire to introduce the whole thing or just specific rules?

MR. SATTERFIELD: Any rule that is applicable in this hearing.

THE COURT: Rules 129 and 131?

MR. GARY: Yes, that is right.

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THE COURT: Rules 129 and 131 are admitted in evidence.

MR. SATTERFIELD: We ask leave at this time to read them into the record.

THE COURT: All right.

MR. SATTERFIELD: "Interstate Commerce Commission, Bureau of Locomotive Inspection. Laws, Rules and Instructions for inspecting and testing of steam locomotives and tenders and their appurtenances.

"Rule No. 129. (a) Locomotives used in road service—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet ahead and in front of such headlight and such headlight must be maintained in good condition.

"(b) Each locomotive used in road service which is regularly required to run backward for any portion of its trip except to pick up a detached portion of its train or in making terminal movements shall have on its rear a headlight which shall meet the foregoing requirements.

"(c) Such headlight shall be provided with a device

whereby the light from same may be diminished in yards and at stations or when meeting trains.

“(d) When two or more locomotives are used in the same train the leading locomotive only will be required to display a headlight.

“Rule 131: Locomotives used in yard service—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of a locomotive under the conditions, including visual capacity set forth in Rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight and such headlight must be maintained in good condition.”

If Your Honor please, at this juncture we also offer in evidence a report of this accident to the State Corporation Commission by the Superintendent of Transportation of the Coast Line as required by law.

MR. DENNY: If the Court please, we wish to object to the introduction of this report on the grounds formerly urged before Your Honor, that the introduction of it violates the policy of the United States as laid down in the Interstate Commerce Act, Section 38, I think is the number, of Title 45.

THE COURT: There is no objection to the form of the report?

MR. DENNY: No objection to the form of the report.

THE COURT: The objection is overruled and the report is admitted in evidence.

(This report was filed and marked Plaintiff's Exhibit No. 3)

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WILEY MASON MYRICK, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. Will you tell the gentlemen of the jury what is your

occupation. A. I am an engineman on the Atlantic Coast Line Railroad.

Q. How long have you been an engineer for the Coast Line? A. Ever since 1924, up to the present time.

Q. Previous to that time in what capacity were you serving with the Coast Line? A. I was in the capacity of a fireman in engine service.

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Q. How long altogether have you been in the employ of the railroad company? A. About twenty-four years.

Q. Are you what is known as a road engineer or yard engineer? A. Both.

Q. You serve in whatever capacity you are called by the company? A. Yes, sir.

Q. On March 20, 1940, were you on duty as an engineer of the Atlantic Coast Line Railroad? A. Yes, sir.

Q. Were you on that day called for any special service for the company? A. I was called for the First 209 on that date.

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Q. Where did you then have to go to respond to that call by the company? A. Acca roundhouse.

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Q. Were you in Clopton yards that evening, the evening that Mr. Tiller was injured? A. Yes, sir.

Q. Were you in charge of the engine, the road engine, that came over from Acca on that occasion? A. Yes, sir.

Q. What was the number of it? A. 1635.

Q. What would be your run on that assignment—from what point to what point? A. From Acca to South Rocky Mount.

Q. You said something a moment ago that this was First 209. Will you tell the gentlemen of the jury what is First 209? A. First 209 is a through package train, you might say—through freight train—from Clopton to South Rocky Mount, what we call a through freight train, a train that

doesn't make very many set-offs, which is Collier and Weldon, North Carolina.

Q. Did I understand you to say "package train" a minute ago? A. Sometimes we call it a package train but it is known as high class freight train.

Q. Where did you get your engine that night? A. Acca roundhouse.

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Q. In making your trip from Acca to South Rocky Mount did you carry only the string of cars that you take out of the R. F. & P. yards? A. No, sir, we carried an additional amount of cars that came from Byrd Street Station.

Q. Was that a nightly occurrence when you were on that run? Was that a nightly occurrence to get part of the train from Byrd Street Station when you were on that run? A. Yes, sir.

Q. How many cars did you take from Acca that evening with your road engine on the way to Meadow and Clopton yards? A. It was a small amount of cars; I would say twelve or fifteen.

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Q. What happened after that? A. We called up at Meadow and got the instruction to cross over from Meadow by the way of Clopton.

Q. When you got to Clopton what did you do then? A. We stopped there for further instructions.

Q. I hand you this map and ask you to point out to the jury, if you will (this is an aerial map) the place where your train stopped when you came over from Acca. Can you orient yourself with this? A. Which is north and south?

Q. See if you can't find familiar items in the landscape? What is that? A. That is Clopton yard office.

Q. What is this road passing across the railroad tracks from east to west? A. That is Clopton Road.

Q. Can you identify these rails that cross Clopton Road running in this direction? A. Yes, sir.

Q. What are they? A. The two main lines and the slow siding.

Q. Point to the slow siding. A. This track here.

Q. The southbound rail? A. This one here.

Q. And where would the northbound rail be? A. Here.

Q. Is Clopton Road a public highway? A. Yes, sir.

Q. Can you point for the gentlemen of the jury where you stopped when you came to Clopton Yard the first time? A. We stopped over here at the yard office.

Q. Did you come around from Meadow, and on what tracks? A. We come around from Meadow on the old line from Meadow down to Clopton.

Q. Will you point out those tracks to me that you came in from Meadow to the yard office at Clopton? Can you point to the yard office at Clopton? A. This is the yard office.

Q. Where are the tracks you came on? A. Here is the track on the left side where we stopped at.

Q. That is the nearest track to the yard office? A. That is right.

Q. Did you stop at the yard office? A. Yes, sir.

Q. Tell the jury what happened then? A. We stopped at the yard office and got further instructions from our Yardmaster as to the next move to make.

Q. Was that order of the Yardmaster communicated to you as engineer and, if so, by whom? A. That was communicated to me by Mr. Dickens by way of signal.

Q. Were you following the signals that were given you by Mr. Dickens? A. After arriving at Clopton, I did.

Q. Mr. Dickens' capacity is what with the railroad? A. He is a trainman.

Q. Was he on your crew? A. Yes, sir.

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Q. After you had both gotten the orders and you stopped there on Clopton Hill, what did you do as a result of the orders that came to you? Tell the jury. A. Well, the next

move that we made at Clopton was to hold to the three gons.

Q. Will you explain to the jury what they are? A. I mean hold onto the three gons.

Q. What are "gons"? A. Gons are high side gondolas for the purpose of hauling coal and sand and gravel, and so forth.

Q. Is that car as high as a freight car? A. Yes, sir, I would say some of them are.

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Q. Were they the low side gondolas? A. No, they were high side gondolas.

Q. You held to three of them? A. Yes.

Q. Where were they to be set off on the road? A. Those three were supposed to be set off, the way I can remember now, was supposed to be set off at Collier.

Q. Where is Collier? A. Collier is our next local point south of Clopton.

Q. And your next point is what after you pass Collier? A. Next local point would be Weldon.

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Q. Collier is the Petersburg yard, is it not? A. Yes, that is right.

Q. That is what you mean when you say Collier? A. That is right.

Q. Then comes Weldon? A. Yes.

Q. Then what comes next? A. Rocky Mount.

Q. That is the end of your run, is it? A. Yes, sir.

Q. When you got your orders and took three cars away from the train that you brought over from the R. F. & P., you held to them, I believe you said? A. Yes.

Q. What did you do then? A. We headed down southward below the slow siding and then stopped.

Q. Did you cross Clopton road? A. Yes, sir.

Q. What did you do then? A. We headed south, southward below the slow siding switch.

Q. Did you go as far south as the crossover? A. We went beyond the crossover.

Q. Do I understand you to mean by that you went south of the crossover? A. Yes, sir.

Q. And what did you do when you went south of the crossover? A. We stopped and got a signal from the trainman after the switch had been changed to back in slow siding.

Q. Who gave you that signal? A. Mr. Dickens.

Q. And did you back in slow siding? A. Yes, sir.

Q. Is that the track that lies right next to the southbound rail? A. Yes, sir.

Q. And as you backed into slow siding what kind of an engine were you using? A. What kind of engine?

Q. Yes. A. Road engine.

Q. That engine that usually carries the train to Rocky Mount? A. An engine of that type, yes.

Q. As you backed up where were these three cars that you had taken away from your train? A. They was on the back of the engine that I backed into the slow siding with.

Q. As you backed in a northerly direction were the cars in front of the tender of your engine? A. Yes, sir.

Q. Was your engine running in reverse? A. Yes, sir.

Q. Who was in the cab with you? A. Mr. Wright, my fireman.

Q. Where was Mr. Dickens? A. Mr. Dickens was on the side of the leading car.

Q. Could you see him? A. Yes, sir.

Q. How was he holding on? A. He was holding on with both hands to the grab-iron.

Q. Did he have a lantern? A. Yes, sir.

Q. Was it in one of his hands? A. Yes, sir.

Q. And both were on the grab-iron? A. Yes, sir.

Q. How fast were you backing back? A. I would say about 4 or 6 miles an hour.

Q. Were you blowing your whistle? A. No, sir.

Q. When you were backing back at that rate of speed on

the slow siding, tell the jury where was the yard engine and what, if anything, was it doing? A. When we backed in slow siding the portion of 209 train had stopped on Clopton Road—

Q. What do you mean by the portion of 209 train? A. That was the portion that we coupled to. That was standing on Clopton Road. When we backed into slow siding the head portion of 209 moved off. That gives us a reverse movement.

Q. As you moved northwardly on slow siding, what was the train of cars drawn by the yard engine doing? A. He was moving southward ahead.

Q. Were you moving in reverse direction beside one another on parallel tracks? A. Yes, sir.

Q. How many cars was he pulling, do you know? A. I don't recall the number of cars he had. He had a cut of cars that he had cut loose from in order to make the classification that was necessary to be made.

Q. Was your bell ringing on your cab? A. When I was backing up, it was.

Q. When you got to Clopton Road and Mr. Dickens was hanging on by both hands, what happened then? A. When Mr. Dickens got on or near the crossing at Clopton Road, he got off.

Q. On which side of the leading end of the back-up movement? A. On the west side which was on my side of the back-up movement.

Q. When he got off what did he do? A. He come toward me.

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Q. Was the back-up movement still moving northward as he moved in your direction with his lantern? Were you still in motion when he came back toward you, going across Clopton Road. A. Yes, sir.

Q. How far did Mr. Dickens by his signals permit you to back up after he had left the rear end of that train? A. I would say a couple of car lengths.

Q. What happened next? A. Well, when Mr. Dickens rode up to the crossing and the cars had covered the crossing, he gave me a signal to stop which is to sign you down.

Q. Where was Mr. Dickens when he gave you the signal to stop? A. Mr. Dickens, I would say, was about the second car from the end.

Q. On the ground? A. On the ground.

Q. Did you stop? A. Yes.

Q. What happened then? A. When I stopped then Mr. Dickens went on westward in order to change the switch for me to come out slow siding when it was necessary for me to come.

Q. Was that in your direction or in the direction of Richmond? A. That was in the southward direction he was going to.

Q. Coming toward you? A. Yes, sir.

Q. When did you first know that Mr. Tiller had been hurt? A. I first knew about Mr. Tiller being hurt when Mr. Wright excited my curiosity by saying that he saw a flashlight on the ground that was lit.

Q. He was your fireman? A. Yes.

Q. In the cab with you? A. Yes, sir.

Q. What happened then? A. Mr. Wright said, "I saw a flashlight on this side burning," and I asked Mr. Wright, "Go get it," and he said, "I am afraid to go down there myself; you come go with me." So in the meantime Mr. Wright said he had been down and investigated the flashlight and didn't see anybody around there and he was uncertain whose flashlight it was or whether anyone had been hurt or something and he wanted somebody to go along with him.

Q. Did you know that Mr. Tiller was in the yard that night? A. No, sir.

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Q. What did you do then? A. We got down on the ground and started to walk toward the flashlight and I

asked Mr. Wright did he have a flashlight and he replied to me "Yes," and I asked him to let me use it, please, so we taken the light and flashed it along on the ground as we walked northward from the crossing and I saw an object that was dark on the ground on the east side of the slow siding about a car length from the engine. When I saw the hat I realized something had happened to Mr. Tiller for I recognized the cap that he wore.

Q. Did you see his flashlight—Mr. Tiller's? A. I had walked by the flashlight.

Q. Where was the flashlight? Tell the jury where was the flashlight lying when you got there? A. The flashlight to my best judgment was laying on the edge of the crossing. I might say four or six foot north of the crossing.

Q. Four or six feet north of the crossing? A. Yes, sir.

Q. Where was the cap lying? A. The cap was lying about, you might say, a car length north of the crossing.

Q. When you say "crossing", what crossing do you mean? A. Clopton Road.

Q. The public highway? A. Yes, sir.

Q. What else did you see? The flashlight—was it burning or not? A. It was burning. That is why it excited our curiosity to note it because we saw it laying on the ground and it was burning. Ordinarily it was dark enough so if it had not been burning we wouldn't have seen the light.

Q. What other object did you see as you went down? A. We walked on further from the cap and we saw Mr. Tiller's gun which was unbreached.

Q. How far was that from the cap? A. That was about a car length from the cap.

Q. What was the distance between the cap and the flashlight? A. I would say about another car length.

Q. What else did you see as you continued on? A. We walked on further and we saw, flashing the light under the car, a dark object under the leading car on the east side between the slow siding and the southbound main line and as we got near to it we saw it was Mr. Tiller.

Q. What did you do then? A. We went up then to his rescue. He was found between the brake hanger—you might say the brake shoe and the wheel. Myself and Mr. Wright—we assisted him from the place that he was fastened to, the very best we could, and laid him out between the southbound main line and slow siding.

Q. Was he conscious when first you got to him, so far as you know? A. He was not conscious when we first got to him but after we straightened him out it looked like he regained consciousness.

Q. Did he say anything; if so, what? A. He asked the question how did he get hurt and what hit him.

Q. Did he say anything else beyond that? A. Not to my knowledge.

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Q. After seeing what you have described to the jury, what did you do then? A. After we notified Mr. Jones and he came down to the scene and saw the condition of Mr. Tiller, he notified me to go back to the engine and discharge my duty and get into my train and get it ready to leave.

Q. Did you then go on to Rocky Mount? A. Yes, sir.

Q. When you first got to Mr. Tiller can you tell the jury what time it was? A. After we straightened Mr. Tiller out between the southbound main line and slow siding, I looked at my watch for my own evidence, and it was 7:15. I set it down on a clearance card that I have got with my instruction when I left Acca, Virginia.

Q. This was March 20, 1940? A. Yes.

Q. Was it dark? A. Yes, sir.

Q. Mr. Myrick, were any lights in that yard, Clopton Yard—overhead lights of any sort? A. No, sir.

Q. What sort of light did you have on the back of your engine or on the tender of your engine? A. We had a small bulb on the lining of the top of the tank which was a 15 or 30 watt light.

Q. What sort of light did you have on the leading end of the back-up movement? A. No other light other than Mr.

Dickens' light. You mean the back-up movement on the leading car?

Q. Yes. A. No other light than Mr. Dickens' light.

Q. This light that you have told the jury was a 30-watt light on the tender of your locomotive in the rear—you are familiar with the headlights on your locomotive, are you not? A. Yes, sir.

Q. And are you familiar with the rule of law which requires that a locomotive light be strong enough to show you an object as large as a man of average size standing erect at 800 feet ahead of your locomotive? A. Yes, sir.

Q. Will you tell the jury whether or not, with that small light on the back of your tender, you could see the erect form of a man 300 feet away? A. No, sir.

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Q. From 1918 until March 20, 1940, will you tell the jury whether or not you were called from time to time to be a member of the crew making up and carrying away the train No. 209? A. Yes, sir.

Q. How many times would you say in that period of years you had part in either making up or carrying away 209 to South Rocky Mount? A. You mean a year or month?

Q. Say a week; how many times a week or a month, either one? A. Well, I would say my record would show that I have been in there five or six times a month.

Q. Over that whole period of time? A. Yes, sir.

Q. Would that include from 1918 up to the time you became an engineman when you were a member of the crew in some other capacity? A. No, that would include from 1924 up to the present time that Mr. Tiller was hurt.

Q. Mr. Myrick, you backed up your road engine following orders given to your conductor and communicated to you by your brakeman on that night? A. Yes, sir.

Q. I want you to tell these gentlemen of the jury have you ever in your experience before made that movement that you made, backing up into slow siding that night? A. No, sir.

Q. What is the usual move that that road engine makes, as you know it from your experience on it, when it comes over from Acca, waiting for the train to be made up? A. The usual movement is we go down southward, south of slow siding, and stand there until our train were being pulled up to where we are supposed to hook on which was sometimes north and sometimes south of slow siding, and sometimes we wait on the brow of the hill where we are stopped at until the yard engine pulled off from it and we head on through the crossover and back up to the train and apply the brakes and release them which is necessary to do and proceed on our journey to South Rocky Mount.

Q. Then you, as I understand it, wait with the road engine either on top of the hill or go on down south of Clopton Road. On what tracks would you wait for the train to be made up by the yard engine? A. Sometimes it would be on No. 1 which is an extension of slow siding and sometimes it would be on No. 2 track.

Q. They are what you call pass-by tracks? A. That is right.

Q. Where are they located with relation to the south-bound rails? A. They are to the west side of the south-bound rails.

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Q. Immediately parallel to the southbound rails? A. Yes.

Q. You would wait on 1 or 2? A. Yes, sir.

Q. Until the train was made up? A. Yes, sir.

Q. But on this occasion do I understand you to tell the jury that you carried cars back in a back-up movement with the road engine? A. Yes, sir.

Q. Can you tell the gentlemen of the jury why that movement was made that night, that back-up movement with cars in front of your engine? A. I was told that move was made to back in slow siding for to get in the clear for the purpose of making a move that was an error leaving Byrd Street Station—the wrong classification.

- Q. Leaving where? A. Leaving Byrd Street Station.
- Q. An error made how? A. An error made in putting the car in the wrong place of the train.
- Q. And that occasioned it? A. Yes.
- Q. Who told you that? A. Mr. Dickens.
- Q. Your brakeman? A. Yes, sir.

CROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Myrick, taking this photograph again which has been introduced as Exhibit No. 2, you did not give the compass directions. Can you tell on that picture which is north? A. Yes, this is north.

Q. Is the bottom of the picture north? A. The right-hand to me now.

Q. These tracks coming in at the bottom of the picture and running diagonally across and disappearing out of the top of the picture are what tracks? They go to what point? A. This is the two main lines and this is the slow siding.

Q. Do those main lines run on into Byrd Street Station? A. Yes, sir.

Q. Is Byrd Street Station below this picture or above this picture? A. Byrd Street Station is north of the Clopton Yards.

Q. So that it is below the picture? A. Yes, sir.

Q. So that the bottom of the picture here is to the north, is it not? A. That is right.

Q. And the top of the picture is to the south? A. That is right.

Q. You will notice on one side of the picture as you look at the picture, the left-hand side, a large shed in the angle between the railroad tracks and the highway. Do you know what that is? A. Yes, the Southern Stockyards.

Q. That is on the east side of the railroad tracks, is it not? A. That is right.

Q. So that as you look at the picture the left-hand side is the east? A. That is right.

Q. And the right-hand side is the west? A. Yes.

Q. Beginning on Clopton Road and beginning with the east track crossing Clopton Road, you see there in the photograph those two rails which make one track? A. Yes, sir.

Q. What track is that eastern track? A. That eastern track is the northbound track.

Q. Look at it again--this eastern track right there? A. That is the spur leading to the Southern Stockyards.

Q. And that spur comes off the northbound main line just north of Clopton Road, does it not? A. That is right.

Q. Then I understand that immediately on Clopton Road to the east of the spur is the northbound main line? A. You are right.

Q. And the next track immediately to the east is the southbound main line?

MR. SATTERFIELD: You mean west.

MR. DENNY: West, I mean.

Q. And the next track immediately to the west is slow siding? A. That is right.

Q. Are those tracks which I have just mentioned all on a level? A. They are level with each other, yes.

Q. Moving further to the west, there is an appreciable space on Clopton Road where there is no track and you come to a track which leads back up to the west of the yard office? A. That is right.

Q. That, I understand, is the track down which you came? A. That is right.

Q. Does the ground rise between slow siding and this track that I have just spoken of on which you traveled or is there a little hill there? A. There is a little hill between Clopton Road and the point where I stopped at.

Q. On Clopton Road, in going west after you pass slow siding, does Clopton Road go up a little hill? A. Yes, sir.

Q. So that this track which runs by the yard office, immediately west of the yard office, is a little higher than slow siding? A. That is right.

Q. And then the last track on Clopton Road you see to the west is higher still? A. That is right.

Q. And then a little further to the west you come to the crest of that little rise, do you not? A. That is right.

Q. South of Clopton Road, which is here at the top of the picture, if you follow slow siding, it runs on down to a switch which connects slow siding with the track on which you came in? A. Yes, sir.

Q. And then that track continues on south. I believe you say that that continuation of slow siding to the south is sometimes called No. 1 track? A. That is right, sir.

Q. And the next track to the west is sometimes called No. 2 track? A. No. 2.

Q. And these other tracks to the west are tracks used in switching and storing and matters of that character? A. That is right.

Q. About how far south of Clopton Road does this yard with these eight or ten tracks extend? A. Well, I would say about 60 or 70 car lengths.

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Q. Now, Mr. Myrick, on the evening in question you came in from Meadow, as I understand? A. That is right.

Q. On this track immediately west of the yard office? A. Yes, sir.

Q. And you stopped close to the yard office north of Clopton Road? A. That is right.

Q. Was Mr. Jones, the Yardmaster, there when you got there? A. No, sir.

Q. After Mr. Jones arrived Mr. Dickens gave you a signal to move forward, did he? A. After he gave me instructions from Mr. Jones.

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Q. As I understand, you ran south across Clopton Road through this switch and pulled down on that No. 1 track far enough to clear the switch? A. That is right.

Q. Then did you stop? A. Yes.

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Q. While you paused there south of the switch on No. 1

track, did the yard engine come in from Byrd Street? A. Yes, sir.

Q. Did the yard engine, after it had taken some of its cars south of Clopton Road, stop? A. Yes, sir.

Q. When the yard engine stopped were cars both south of Clopton Road and across Clopton Road and north of Clopton Road? A. Yes, sir.

Q. Then what happened? A. Well, when Mr. Dickens gave me the signal to back into slow siding, after the switch had been changed, in order to get in the clear when this classification was made, the first portion of 209 pulled off.

Q. What do you mean by the first portion of 209? A. At that particular time to bring out, you might say, two classifications at one time which are known as First and Second 209. Second 209 classification would be on the head end of it.

Q. In other words, you mean the yard engine? A. That is right.

Q. It brings out from Byrd Street cars not only for your train but for the second section of 209? A. That is right.

Q. Those cars for the second section of 209 are for the local freight train which goes on some other time in the evening? A. That is right.

Q. Those cars are usually up next to the yard engine? A. That is right.

Q. And your cars are on the rear portion of the cut brought from Byrd Street? A. That is right.

Q. You said the front portion of 209. By that do you mean the front portion of the cars brought from Byrd Street by the yard engine moved on south? A. Yes, sir.

Q. Had a cut been made in the cars brought from Byrd Street? A. A cut was made, I imagine, about the same time I was given the signal to back up.

Q. In other words, at about the time you were given the signal to back up? A. The engineman on the switch engine received a signal to go ahead and at the same time I received a signal to back up. We both moved in opposite directions.

Q. So that while you were backing up the first part, the

south end of the cut from Byrd Street, moved on south and the north end of the cut from Byrd Street remained stationary over Clopton Road? A. Right.

Q. Do you know where that cut was made in the cars from Byrd Street? Was it made north or south of Clopton Road? A. It was made south of Clopton Road.

Q. About how far south of Clopton Road? A. I am not in position to say how far it was made south of Clopton Road. You see I was a distance up in the cut from him. I imagine his engine had pulled, you might say, ten or twelve car lengths by me, holding on the portion that he was holding on to and when he made a cut with this classification that was made in error, he signaled his engineman to go ahead and I had the same signal to back up at the same time and we moved in opposite directions of each other until I received the signal from Mr. Dickens to stop.

Q. And, as I understand it, when you were backing up, these cars were then in four sections? You had left one section up here on the hill? A. That is right.

Q. You had with you three hopper cars that you were backing into slow siding? A. That is right.

Q. The south end of the cars from Byrd Street was being pulled by the yard engine on down to the south end of the yard? A. That is right.

Q. The north end of the cars from Byrd Street, which were astride Clopton Road, were standing still? A. Yes, sir.

Q. Mr. Myrick, as you backed down slow siding how high up on that west side of the lead end of the first car in your back-up movement was Mr. Dickens? How high up off the ground? A. Mr. Dickens was on the step of the car holding on to the grab-iron on the leading end on the side I was on when he made the back-up movement.

Q. And that step is a foot or 18 inches above the ground? A. I would say two feet.

Q. Was Mr. Dickens, as you backed up, giving you any signal? A. He gave me a signal to back up.

Q. What is the signal to back up? A. A round circle.

Q. With his lantern? A. That is right.

Q. Was he giving you that signal during the back-up movement? A. He didn't give me that signal during the whole move.

Q. He gave it to you part of the time? A. That is right.

Q. And part of the time he was holding his lantern stationary? A. On the hand iron of the car.

Q. As I understand, when you are on First 209, the through freight, you carry cars to Petersburg or Collier, as it is sometimes called, to Weldon and to South Rocky Mount? A. That is right.

Q. In classifying those cars, in other words, in determining the arrangement in which they will be placed in the train, what is the arrangement in which they must be placed before you leave Clopton? What cars come immediately first behind your engine? A. What do you mean? In the classification to be set off?

Q. No, the classification to be made up for you at Clopton. What cars, when you leave Clopton, are immediately behind your engine going south to South Rocky Mount, from Clopton to South Rocky Mount? A. Well, I would say the Collier cars, which we will call Collier, known as Petersburg, would be on the head.

Q. That would be right behind your engine? A. Yes, sir.

Q. Then which cars? A. The cars next would be Weldon.

Q. Then the South Rocky Mount cars? A. Yes, sir.

Q. Does Weldon come first or Petersburg come first? A. Petersburg would come first, providing you didn't have any additional pick-up at Petersburg.

Q. Suppose you had Weldon cars on there and cars for Petersburg and Rocky Mount, which would be next to the engine? A. Well, if you had cars in both of those classifications, the Petersburg cars would be on the rear and the Weldon cars would be next to the engine.

Q. The Weldon car next to the engine and then Petersburg cars and then South Rocky Mount cars? A. Yes, sir.

Q. Is it a normal occurrence, almost a nightly occurrence,

for the road engine to come from Acca with cars certainly for two of those three points, Petersburg, Weldon and Rocky Mount, and cars come from Byrd Street for two or all three of those points? Do you understand my question? A. Yes.

Q. Is that almost a nightly occurrence. A. That is a nightly occurrence.

Q. Is Clopton Yard then used for the purpose of taking the cut that you bring and taking the fast freight cars brought from Acca in order to amalgamate those two cuts so as to get them prepared for you to take on south? A. Absolutely right.

Q. I suppose some evenings that can be done in a small number of movements and other evenings it takes a large number of movements to get that train prepared? A. Yes.

Q. Who prepares that train? Does the road engine prepare it or does the yard engine prepare it? A. The yard engine.

Q. On the night in question had you kept your engine up on the hill by the yard office, could the yard engine have prepared your train for you that night? A. That particular night?

Q. Yes. A. No, sir.

Q. Is it a usual and normal and frequent occurrence, depending on the cars which come in and the arrangement of those cars, that the road engine, either by itself or with some cars, has to come down off the hill and get out of the way so that the yard engine can make up the train? A. Yes, sir.

Q. When the road engine comes down off the hill and gets out of the way to permit the yard engine to make up the train, is it making a move which you gentlemen recognize as a move in road service or is it making a move which you gentlemen recognize to be a movement in yard service? A. That is in yard service.

Q. Is a road engine making a move in road service or is it making a move in yard service? A. Let me get it clear before I answer that.

Q. My question was not well worded. A. When I got in slow siding by the signal from Mr. Dickens, that was a road move.

Q. That was a move in road service? A. Yes, that was a move in road service for the purpose of a yard engine making the necessary classification that should be made with that train.

Q. When the yard engine was making the classification moves, after you had gotten out of the way, was the yard engine making moves in road service or in yard service? A. The yard engine was making moves in yard service.

Q. I understand that after you had received the signal from Mr. Dickens to stop your back-up movement and you had come to a stop, the car immediately north of your engine and part of your tender were on Clopton Road? A. Yes, sir.

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Q. Was there anything unusual about the condition of that pistol? A. The pistol was unbreached. What I mean by that, the chamber was out.

Q. The chamber was open? A. Yes, sir.

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Q. As I understand, the truck, as you call it, the wheels under a freight car, consists of four wheels, two on a side? A. Yes, sir.

Q. Was Mr. Tiller caught up under the north wheels, that is the lead wheels of the truck, or under the south wheels, that is the second wheels of the truck? A. Mr. Tiller was caught under the second wheels of the truck.

Q. How far from the end of the car is this wheel in which Mr. Tiller was caught? A. I don't know the exact number of inches and feet, sir. I would make a rough estimate. I would say about 5 or 6 feet.

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Q. Have you worked both in yards that have overhead lights and in yards that do not have overhead lights? A. Yes.

Q. From your experience in working in lighted yards and in unlighted yards, which do you find makes the operation of the movement of trains in the yard easier and better for men working in the yard? A. I prefer the lighted yard.

Q. Clopton Yard had no overhead lights in it? A. No, sir.

Q. During the three years, we will say, or approximately three years prior to the death of Mr. Tiller, how many times a month would you say that you were there in Clopton Yards when 209 was made up, during the three years prior to the death of Mr. Tiller? A. Well, I would say from four to six times a month.

Q. And had you been through the years in there about the same number of times? A. I would say yes, sir.

Q. Or had there been a considerable period in there when you had been very little on this run? A. Well, it is times that being in the freight run that I went for, you might say, eight or ten days and not come in contact with Clopton at all—what I mean, come by the way of Clopton at all, and then, on the other hand, I have been in there every other night for, you might say, six or ten nights out of a month.

Q. Before moves are made in a freight yard is notification given to men working around through the yard or only to those that have to make the moves? A. Everyone would have to watch for hisself in yard service.

Q. By that do you mean that men who are working in yards know that they are not going to be warned of the particular movements that would take place but that almost any movement may take place in a yard? Is that what you mean?

MR. GARY: We object to that on the ground that it is a question of law.

THE COURT: Objection overruled.

BY MR. DENNY:

Q. I mean this, Mr. Myrick: Before a move is ordered in a yard, or before a move is made in a yard, are the men

working around in the yard warned of what that move will be or does the man in charge of the yard simply tell the people who make the move of the move he wants made? A. The man in charge of the yard tells the men that is in charge of the particular move that he wants to be made.

Q. Do you give any warning to other people around in the yard or any notification—tell them what move you are going to make? A. There is no other warning to give other than to tell them personally.

Q. That is the people who are going to make the move? A. Yes.

Q. In other words, if the yard engine is going to make a move out there, are you, as road engineer, informed what that move is going to be? A. No, sir.

Q. And if a man is working on the ground in the yard but doesn't have to throw any switches or doesn't have to do anything relating to the particular move, is he told what the move will be? A. No, sir.

Q. Do you, in making up freight trains in Clopton Yard and in other yards, follow the same routine night after night or do you sometimes use one set of tracks and another time use another set of tracks? A. Well, at the time of this particular occasion on 209 we get our train from the south end of Clopton Yard.

Q. And sometimes you get it other places? A. Sometimes we get it up at the crossover at slow siding which is Clopton Road.

Q. Let me come back to my question and see whether you feel my question can be answered. If you don't feel that it can be answered, just say so. In making up freight trains in a freight yard, Clopton or any place else, do you regularly follow the same set of moves day after day or night after night or do you on one occasion make one set of moves and on another occasion another set of moves? A. We make the move that it is necessary to suit the condition of what we come there with.

Q. And that means different moves on different occasions, doesn't it? A. Yes.

Mr. DENNY: If the Court pleases, there is a stipulation or agreement of counsel that it is not necessary to prove by the stenographer the former testimony. I have the former testimony, using it under that stipulation.

Q. Mr. Myrick, did you testify when this case was tried in September of 1941? A. Yes, sir.

Q. On that occasion your testimony was as follows, part of it, on cross examination:

"Q. For how long prior to Mr. Tiller's death had you been on that train an average of five or six times a month?"

They were referring to First 209.

"A. That has been practically ever since Mr. Tiller's death.

"Q. I say before Mr. Tiller's death. A. Oh, before Mr. Tiller's death I would say it was months that I wasn't in Clopton Yard at all.

"Q. So that before Mr. Tiller's death on just occasional times were you on that run? A. Well, I reckon we are not assigned to any regular run and in freight work we work first in and first out. I would say I would average in two or three trips per month.

"Q. And that had gone on for about how long? A. That had gone on for about, I reckon, from about 1938.

"Q. So that beginning about 1938 you had averaged two trips a month up to Mr. Tiller's death? For about two years prior to his death you had been in there a couple of times a month? A. Yes."

On the former occasion you testified that during the two years prior to Mr. Tiller's death you had been in there an average of two or three times a month and sometimes a month at a time without being in there. Your recollection today, on both direct and cross examination, is that during that period you had run in there four to six times a month. Can you state to the jury which you think is your more accurate estimate? The estimate you gave back in 1941 when

you testified before or the estimate you give today. A. Well, I have no way of telling the exact number of times that I had been on this particular run but I would say, owing to the time tickets that I made in this particular estimate, it would be anywhere from three to four times per month.

Q. Do you think your memory then, two years ago, was more accurate concerning this matter than it is today? A. Well, I don't see why it should be, sir.

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. You said something in response to Mr. Denny's question a moment ago, when he was seeking to compare your testimony on a former occasion with what you are saying today, about some time tickets. A. Yes, sir.

Q. What do you mean by that? A. That is a record of the time that I make on these particular jobs, which is First 209 or Second 209 or Third 209, or whatever they might be.

Q. Do I understand you have referred to your time tickets since the last trial? A. Yes.

Q. Have you got those time tickets? A. I have a portion of them.

Q. What do they indicate as to the number of times that you have been on that 209 run since 1924 up until the time of the death of Mr. Tiller? A. Well, my testimony today, I think, is correct.

Q. About how many times per month? A. I might say from three to four times per month and sometimes I have been in Clopton Yard as much as eight or ten times per month and then a month goes that I don't go in there at all.

Q. You said something this morning about five or six times a month? A. Well, I would reckon that would be a rough estimation about the time but I reckon if would average if I could correct myself by looking at my time tickets, if I had them all at present that I could show—

Q. Have you got them at your home? A. I have a portion of them at home.

Q. What years do they cover, do you know? A. They come in from the time when I was promoted right up to the present time.

Q. From 1924 right up to the present time? A. Yes.

Q. Mr. Denny asked you something a moment ago about the truck on this coal gondola. There are two trucks on the front end of the car, I believe you said, and there are two on the back end of the car? A. Yes, sir.

Q. The lead truck has four wheels, two on each rail; is that not true? A. That is right.

Q. Which one of the trucks did you have in mind that Mr. Tiller had been found under, the first or the second truck at the leading end of the back-up movement? A. I would say the second truck. I would say the first truck would mean the truck with the first wheel on the leading car.

Q. You mean the first wheel of the first truck on the leading car? A. Yes, sir.

Q. Was he in front of that wheel or between that wheel and the second wheel? A. He was behind the second wheel, between the brake hanger and the brake shoe.

Q. Between the second wheel of the first truck or the second wheel of the second truck? A. The second wheel of the first truck.

Q. He was between the first and second trucks? A. No, sir, he was behind the two trucks. The whole two trucks, it looked like, the way he was found, had run over him.

Q. You don't know about that but that is the position that you found him in? A. That is the position that I found him in. He was caught between the brake hanger and the brake on the second wheel and his body was forced up about halfway of the wheel.

Q. Mr. Myrick, I want to ask you this question: Mr. Denny has asked you about the many different movements that are made in a yard and Clopton Yard was mentioned particularly, in assembling and classifying trains. I want

you to tell the jury whether or not those many moves are made by the road engines that you were on at the time that you were assigned to 209 or made by the yard engine? A. Those moves was made by the yard engine.

Q. Did you ever make any such move as you made on this night in all your experience before? A. Not in Clopton Yard.

Q. Do you recall that any time in your whole experience in Clopton Yard, at the time 209 was being made up, there were any other engines in that yard save your road engine and the yard engine?

A. No, sir, I do not.

Q. Just those two engines? A. Yes. If there was any more, it would be beyond my knowledge.

A. I am not in position to say what that yard engine was doing but I do say that we made the back-up movement when the yard engine was going ahead.

Q. In which direction? A. In southward direction.

Q. Then you were moving in opposite directions at the time? A. Absolutely, sir.

RECROSS EXAMINATION

BY MR. DENNY:

Q. Did you see Mr. Tiller at all that evening until you found him there caught up under the wheel and brake shoe? A. No, sir, I did not.

Q. As I understand, you have on each freight car two trucks, don't you? A. Yes, sir.

Q. One at the front and one at the rear? A. Yes, sir.

Q. Each truck consists of two sets of wheels? A. Yes, sir.

Q. So that as you look at a freight car from the side, you see four wheels? A. Yes.

Q. Was Mr. Tiller caught under the north wheel of this

car or was he caught under the next wheel to the north wheel? A. Mr. Tiller was caught under the next wheel to the north wheel. Mr. Tiller, in facing the movement going ahead, was caught under the second car and he was pinned under the brake hanger of the second truck. What I mean by the second truck, the second wheel.

Q. Of the front truck? A. Of the front truck.

Q. Was there any indication that the first wheel of that truck had run over him? A. I didn't see it.

Q. Would you be able, having found him there, to state any facts which would indicate whether the front wheel had run over him or whether it had not run over him? A. No, sir, I didn't look for any indication of what he had been hit by or otherwise. I was so badly worked up on the condition I found him in that I gave him all of my attention, and to assist him out of the condition he was in.

Q. Was his leg, or his arm, mashed flat? A. His leg was.

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MR. SATTERFIELD: We have agreed, provided it meets with your approval, to permit the defendant to put on some witnesses at this time and we will be delighted to accommodate them.

J. A. WALL, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. TOWNSEND:

Q. Your name is Mr. J. A. Wall? A. Yes, sir.

Q. Where do you live, Mr. Wall? A. Savannah, Georgia.

Q. What was your position with the Atlantic Coast Line in March of 1940? A. Superintendent of Transportation.

Q. Are you now Superintendent of Transportation? A. No, sir, I retired on the 15th of July.

Q. In the course of your duties as Superintendent of Transportation of the Coast Line, was it your duty to make up reports to the I. C. C. and the various state corporation

commissions of accidents that occurred on the road? A. Yes, sir.

Q. And how were those reports made up, Mr. Wall? From what data? A. They were made up by a clerk in my office, assigned to that job and he made them up from reports received from the superintendent and from the train crew.

Q. Did you personally have anything to do with that, Mr. Wall? A. Not in the preparation of the report.

Q. Who was your clerk who made up those reports in March, 1940? A. Mr. J. M. Parrish.

Q. You made a report which has been introduced in evidence here of an accident to Mr. J. L. Tiller on March 20, 1940. Did you know anything personally about the facts of that accident? A. No, sir.

Q. You signed such a report in the course of your duties, did you not? A. Yes, sir.

Q. And who made up the report? A. Mr. J. M. Parrish.

CROSS EXAMINATION

BY MR. SATTERFIELD:

Q. Mr. Wall, did you make this statement under oath? A. Yes, sir.

Q. Have you any reason to question its veracity now? A. No, sir.

MR. GARY: May it please the Court, at this time by stipulation of counsel we would like to read into the testimony the statement of Mr. F. A. Wilkinson, a witness who testified at the former trial, referred to this morning. Mr. Wilkinson testified as follows—examined by Mr. Moore.

MR. DENNY: Mr. Moore was counsel for the plaintiff?

MR. GARY: Yes, and Mr. Wilkinson is in the hospital, so that it was impossible for him to be here today and counsel have agreed to stipulate his testimony.

NOTE: The testimony was read as follows:

F. A. WILKINSON, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. MOORE:

Q. You are a section foreman for the Atlantic Coast Line Railroad Company, are you not? A. Yes, sir.

Q. How long have you been employed by them? A. 28 years.

Q. Do you have charge of the Clopton Yard territory?
A. Yes, sir.

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Q. Mr. Wilkinson, the distance between the rails of the southbound main line and the inner rail of the slow siding is the same all the way from Clopton Road down to this switch, is it not? A. Yes, sir.

Q. What is the distance between this rail and of the southbound main line, that is the far western rail, and the eastern or inner rail of the slow siding? A. That is 7 foot 11 inches and one-half.

Q. What is the total overhang of a freight car? How much does it extend out over the rail? A. Well, in some instances a regular car would be 24 inches from the outside of the rail but there is a variation sometimes in a larger sized car.

Q. In the usual sized car there would be an extension of two feet? A. That is right, from the rail.

Q. So that if two trains, both of which had usual cars on them, were passing each other on the slow siding and the southbound main line, what would be the distance between these two trains? A. That would be four foot three inches and one-half.

Q. Does a hopper car, which you call a coal hopper, project out any more from the rail than does the ordinary freight car? A. Yes, sir, the drop-over car does.

Q. How much more? A. Four inches.

Q. And what would be the distance between a train on the slow siding and one on the southbound main line if one of those trains had hopper cars in it? A. If both had hopper cars?

Q. If one side had hopper ears. A. If one side had a hopper car, you would have three foot seven and one-half inches clearance.

Q. What would it be if both had hopper cars? A. You would have three foot three and one-half inches.

Q. That three feet three and one-half inches would be the distance between the two trains moving on parallel tracks? A. Yes, sir.

Q. Is there any street light at Clopton Road? A. No, sir.

Q. Will you state again the distance between two normal freight cars, that is the ones that extend over the usual distance, moving on those parallel tracks? A. That is the average freight car?

Q. Yes. A. That would be four foot three and one-half inches.

Q. The overhang on each side would be twenty-four inches, would it not? A. Yes, sir.

CROSS EXAMINATION

BY MR. TOWNSEND:

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Q. Your overhang then is calculated from the center of the rail and not the edge of the rail? A. That is right.

Q. So you would have a clearance of four feet three and one-half inches, wouldn't you? A. That is right.

Q. Is that plenty of room for a man to walk between while the trains are going? A. Well, I will tell you they don't get much larger than I am and I walk through very handy.

Q. While the trains are going in opposite directions? A. Yes, sir, if they wasn't running too fast.

Q. Then if they are running too fast— A. If they are running too fast I lay down.

REDIRECT EXAMINATION

BY MR. MOORE:

Q. Mr. Wilkinson, would you stand in between those two trains, facing one of them, and hold out your arm and not

watch the other one? A. Not if I knew the other one was coming.

RECROSS EXAMINATION

BY MR. TOWNSEND:

Q. Is that the ordinary and usual clearance between tracks? A. That is our standard—13 foot centers, from center of track to center of track.

MR. SATTERFIELD: Our next witness is a gentleman we desire to call as an adverse witness. I don't know whether the rules of the court require me to state the reason for that and I am not sure that I am in order in stating it in the presence of the jury.

THE COURT: Do you want to examine him as on cross examination?

MR. SATTERFIELD: Yes.

THE COURT: Have you gentlemen anything to say?

MR. DENNY: We don't know who he is referring to.

MR. SATTERFIELD: Dickens.

MR. DENNY: I recall Mr. Dickens formerly was one of Mr. Satterfield's witnesses in the trial of this case and Mr. Satterfield, prior to Mr. Dickens' former testimony, summoned this witness to give a deposition, so that prior to the former trial Mr. Dickens had given a deposition and Mr. Satterfield put him on the stand as his witness in the former trial and I see no reason why he should be accorded the liberty of cross examination.

MR. SATTERFIELD: In answer to that I should like to state to the Court that since the former trial I went to the home of Mr. Dickens to ask him if he would not confer with me and he showed me the rule of the company in which he was told in that rule that he should not talk to any attorneys except attorneys for the railroad company. We then called Mr. Denny on the telephone in Mr. Dickens' apartment and Mr. Denny came to the phone and called Dickens to the

phone and told him to talk to us but he steadfastly refused to talk to us on the matter and I think we are within the rules in asking that he be called as an adverse witness.

THE COURT: Is he an employee of the company?

MR. SATTERFIELD: He is an employee of the company and one of the crew on the night of this accident.

MR. DENNY: In reply to that statement, I was called by Mr. Satterfield and Mr. Dickens came to the phone. I told Mr. Dickens that the rule of the company was that it was permissible for him to talk to any party in interest or their attorney if he desired to talk with them, that the company had nothing to do with the question of whether he talked with them or didn't talk with them and, so far as the company was concerned, he was at perfect liberty to talk or not to talk as he saw fit and that there was no rule prohibiting him from talking to a party in interest or his attorney.

MR. SATTERFIELD: Let me say, in reply to that, that I called Mr. Dickens' attention to the fact that the rule which he referred me to, printed in the rule book, which says they are not permitted—employees of the Atlantic Coast Line Railroad Company—to talk to anybody save the attorney for the Coast Line Company, had been changed by congressional enactment, and, despite that assurance on my part, despite the conversation with Mr. Denny, he refused to talk with us and I think we should be permitted to call him as an adverse witness and not be restricted to direct examination of this witness.

MR. DENNY: And in reply to that statement I think I should say that I called to the attention of both Mr. Dickens and Mr. Satterfield that after the Act of Congress was amended in 1939, the rule of the Atlantic Coast Line was amended in exact accordance with the Act of Congress and, not only under the Act of Congress but under the rule of the railroad there is no prohibition against an employee of the railroad talking to a party in interest and, of course, a party in interest includes counsel for a party in interest. In the particular case of Mr. Dickens, I say again that Mr. Sat-

terfield had Mr. Dickens on deposition in the spring of 1940 and put him on this stand in September of 1941 as his witness, so that he has before him two records of Mr. Dickens' sworn testimony.

THE COURT: Mr. Satterfield, you can put Mr. Dickens on the stand and if it should appear that it is necessary to examine him as a hostile or adverse witness, I will allow you to do so.

R. L. DICKENS, called as a witness by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. What is your age and your occupation? A. Twenty-seven; I am a trainman, braking and flagging and extra conductor on Atlantic Coast Line Railroad.

Q. How long have you been in the employ of the Atlantic Coast Line Railroad? A. This December it will be seven years.

Q. Have you your rule book with you, Mr. Dickens? A. Yes, sir.

Q. May I see it, please. Are there any other amendments or addenda in the rules that you now have in your possession? A. What is that now?

Q. Are there any amendments to these rules that you now have in your pocket that go with these rules? A. No, sir, that rule book stands as it should be.

Q. Just as it is? A. Yes.

Q. You have had no notice of any change in the rules of this book, have you? A. I pasted a slip over Rule 711, a new ruling on Rule 711.

Q. First of all, may I ask you if this book was issued to you by the Atlantic Coast Line? A. Yes.

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Q. You were examined on the contents of this book? A. Yes.

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Q. It contains general rules and special rules? A. That is right. Our examination at that time did not include the rules—I believe it is special rules. It did not include the special rules.

Q. But since then have you been examined periodically on all of the rules? A. Not periodically. I have taken the conductor's examination and we have rule meetings.

Q. Don't you have rule meetings every year? A. Yes, sir.

Q. How often? A. I believe those rule meetings are every six months. Is that right?

Q. You just answer, please. A. As far as my knowledge, every six months.

Q. You have ample knowledge on this; you have not been long in the employ of the company. A. Yes, sir, I think so.

Q. How often have you been examined on the rules? A. Twice.

Q. Each year? A. Once when I was hired as a brakeman and once when I was promoted to conductor.

Q. Isn't it a fact that you are examined every fall, that you have a group who get together and go over the rules down here on the company's premises? A. Yes.

Q. You have been over them more than just twice, have you not? A. Not me personally—just a group getting together and talking about the rules.

Q. Who conducts that meeting? A. At times I have been at a rule meeting with Mr. Pollard conducting the meeting and Mr. Murchison.

Q. The gentlemen you have named—what is their connection with the railroad company? A. Trainmaster and Superintendent.

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MR. SATTERFIELD: At this point, if Your Honor please, we want to offer this book of rules in evidence.

MR. DENNY: May it please the Court, we have no objection to Mr. Satterfield taking any rule he desires to take out of that and offering it in evidence but each one of these books

is specially accounted for by the Coast Line and issued to one man. It happens to be they are all numbered. We do not wish to leave the rule book here in evidence or have the rule book as whole introduced.

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MR. SATTERFIELD: I am not approaching that question at the moment. I have attempted to lay the foundation for the introduction of some of the rules of this book and I assure the Court at the proper time we will point out the rules that are pertinent when the evidence is in as to those we want to be made a part of the record and we have been unable to get hold of this rule book until just now by a subpoena duces tecum and we would like to read the rules in the book and point out, before the evidence is in, those rules that we ask to be made a part of the evidence.

THE COURT: It can be marked for identification and then, after examination, you can offer the rules you desire.

MR. DENNY: I would like to say to the Court that we object to the introduction of no specific rule but we do object to the introduction of the rule book as a whole.

THE COURT: It has not been introduced.

MR. SATTERFIELD: I ask that it be identified and later we will point out the rules that, in our judgment, are pertinent and ask the Court to have them made a part of the record.

(The rule book was marked Plaintiff's Exhibit No. 4 for identification only)

BY MR. SATTERFIELD:

Q. You are a brakeman and you were assigned to 209 on March 20, 1940, were you not? A. Yes, sir.

Q. Where did you join your train crew? A. At Acca Yard.

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Q. When you got to Clopton Yard what did you do? A. When I got to Clopton Yard there was no one there. Shortly after Mr. Jones, our Yardmaster, drove up and I walked toward him for instructions.

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Q. Instructions for what? A. It is our usual move to go Clopton and find out the moves they want to make and follow the Yardmaster's instructions.

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Q. What did the yardmaster tell you to do? A. He asked what we had in our train and I told him three Petersburg cars and the rest through.

Q. Then what did you do? A. He told me to cut my three Petersburg cars off and back into slow siding.

Q. Where were you when you received these orders? A. Around in the vicinity of Clopton Road.

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Q. I want you to explain to me how you got off the hill. The Yardmaster told me what to do and I went to the car of three cars, pulled the pin, cut the air, gave him a signal to go ahead and he proceeded to do as my signal told him.

Q. It was Mr. Myrick you are talking about? A. Yes.

Q. Where did you go? A. Went off the hill down to the ditch that leads to No. 1 or slow siding. In reverse movement I threw the switch back and he backed into slow siding on my signal.

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Q. Did he carry them south of the crossover down on the road before you threw the switch for them to come back?

Yes, sir, he would have to.

Q. He had room enough to get in there with three cars and the engine, didn't he? A. Yes, sir.

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Q. You were but following the orders of the Yardmaster? A. That is true.

Q. Did he order you to back the road engine up that night with these coal cars in a backward movement into slow siding? A. Yes, sir.

Q. When did you first gave a signal to Mr. Myrick to come

on back into the slow siding? A. After I had thrown the switch.

Q. While you were standing on the ground? A. Yes, sir.

Q. Then what did you do as he started the back-up movement? A. Caught the rear of the lead hopper car on the engineer's side and rode back to the road crossing, got off at the road crossing and signed him back until I figured he was in the clear and gave him a stop signal.

Q. When the leading end of the back-up movement came to Clopton Road, the south side of Clopton Road where you begin to cross it, you got off? A. Yes, sir.

Q. Did the three cars and the road engine continue to move slowly on across Clopton Road? A. Yes, sir.

Q. You had left it then, had you not? A. That is right.

Q. Was there any light on the leading end of that back-up movement as it went across the road? A. No, sir.

Q. Was there any light on it as it passed on down and beyond the road and off of it? A. There was a light on the rear until I got to the center of the road.

Q. I am not asking you that. When it had passed Clopton Road and was going on down northward of Clopton Road, did it have any light on the leading end of the back-up movement? A. When it passed Clopton Road it had no light on the lead of the back-up movement.

Q. From that time until you stopped? A. That is right.

Q. Did you estimate, standing where you were, that it had gone far enough down into slow siding? A. Yes, sir, I could see it was in the clear.

Q. Which end of the train were you watching to see whether it was in the clear—the leading end of the back-up movement or the engineer? A. The engineer.

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Q. When you got off of the coal car did you not then turn and face in the direction of the engine, Mr. Myrick's engine, the road engine? A. I probably did.

Q. Were you watching the road engine to see whether it was in the clear? A. Yes, sir.

Q. Did you or did you not turn and look toward the engine when you got off? A. I don't know. I suppose I watched the engine to see if it was in the clear after I had protected Clopton Road.

Q. After the leading end of the back-up movement was crossing the road and was heading in a northerly direction, isn't it a fact you turned to see when the engine would clear the switch? A. That is my natural move.

Q. Didn't you make that move that night? A. Yes, sir.

Q. Didn't you walk in that direction because you wanted—
A. I walked in the direction of the switch, yes, sir.

Q. With your lantern? A. Yes, sir.

Q. Which hand were you carrying your lantern in when you got off of the coal car? A. My left hand, I believe.

Q. You were hanging, as you got ready to leave, with your right hand in this position, holding on to the handlebar or whatever you call it? A. The hopper car.

Q. And you stepped off with your left foot first and your lantern in your left hand, did you not? A. Yes, sir.

Q. You wouldn't step off with your right foot first? A. No, sir.

Q. When you stepped off is it or not a fact that the gondola car was moving onward across Clopton Road? A. Yes, sir.

Q. In the years that you have been with the Coast Line since 1937, how many times have you been called for assignment of duty in connection with 209? A. Up to the present date I would say approximately forty times. That is just an approximate guess on my part. I really don't have the actual figures.

Q. In the forty times that you were assigned to duty with 209 was it with the road engine or yard engine? A. With the road engine.

Q. Was there ever an occasion when you were connected with the making up of train 209 and the road engine that you made a similar move to back up into slow siding? A. Was there ever an occasion?

Q. Did you ever make that move that you made that night with that road engine before? A. I have made that move, yes, sir.

Q. How many times? A. I don't know. It depends on how the cars are situated in the yard.

Q. How many times have you backed, by your signal on order of the Yardmaster, that road engine with cars being pushed previous to that time? A. Never.

Q. The only time you have ever done it is since? A. Yes, sir.

Q. Up to then did you mean to say you had forty experiences with that run? A. No, sir, not previous to that time.

Q. Previous to that time how many times had you been in there? A. I would make a rough estimate of twelve to twenty times and might have been fifteen or eighteen or twenty.

Q. On the twelve or eighteen or twenty occasions, tell the jury what you did with that road engine? A. Sometimes we were coming to Clopton Yard having Petersburg cars and through cars. The train coming to Clopton Yards would have Petersburg cars and through cars. I would cut my Petersburg cars off, couple to the train from Byrd Street, pull it up and back up to the rear portion of my train and go away. Sometimes arriving at Clopton we had Weldon and Petersburg cars. My natural move would be to get in the clear with my Weldon cars, let the yard engine come to the train I had brought to Clopton, get the Petersburg cars off of that train and put them to the train that came from Richmond yards, thereby classifying the train together. After they had made their move the yard engine would go away and I would get out of the clear, that is, I would come back to the train that the yard engine had left there, couple up and go away.

Q. Then you would either wait sometimes on top of the hill or you would go down to the crossover or south of the crossover and wait in the yard for the yard engine to make the train up? A. We always waited on top of the hill until

the conductor had come down and called the yardmaster by telephone.

Q. Even before that you waited sometimes below in the yard for the train to be made up? A. Occasionally.

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A. We usually waited on the hill until the yard engine showed up.

Q. I mean after it came over didn't you go down over the crossover to get out of the way and stay out of the way?

A. We usually waited in No. 1.

Q. You usually waited in No. 1? A. Yes, and sometimes maybe No. 1 was filled up.

Q. Then there was No. 2 to the right? A. You couldn't get into No. 2 by head-on movement. You would have to go up in No. 1 and back back. We were on the hill sometimes until the yard engine was through making his moves.

Q. Save for the light that you carried in your hand, was there any other light anywhere or about that leading car on that back-up movement? A. On the leading car, no, sir.

Q. What sort of light did you have on the engine tender, Mr. Myrick's engine? A. Had an electric bulb about the center of the end of the tender on top.

Q. How big a light was that? A. I imagine it is a 40-watt bulb maybe, a small electric bulb.

Q. Did it throw any light down on the track? A. No, sir.

Q. Was there any light in the yard at all? A. Nothing but switch lights.

Q. Green and red? A. Green and yellow.

Q. They are on the ground, aren't they? A. Yes, sir.

CROSS EXAMINATION

By MR. TOWNSEND:

Q. Mr. Dickens, did you ever operate in a lighted yard?

A. We leave Acca, Virginia, in a lighted yard.

Q. What is your preference as to efficiency and safety of a lighted yard and an unlighted yard? A. Personally I

would prefer to work in an unlighted yard. A lighted yard caused me to fall in a ditch at Acca Yard once.

Q. What is your reason for saying that you prefer working in an unlighted yard? A. My reason is everything is dark and if I have a lantern in my hand you can see what you want to see with that lantern. If there is a floodlighted yard it is not focused exactly like I want it and shining in my eyes, on the cars and everywhere and it blinds me at times. It blinded me so much that night that I stepped into a ditch at Acca Yard.

Q. You feel safer in an unlighted yard? A. I would prefer an unlighted yard. I feel safer in an unlighted yard.

Q. Why, Mr. Dickens, did you go to Clopton Road on the lead end of the three hopper cars that night? Why did you go to the road? A. To protect the road crossing from the westbound traffic. The road was already protected by a cut of cars. I don't mean westbound. I mean eastbound from the west. The road was already protected for westbound traffic from the east by a cut of cars.

Q. And, as I understand it, the train from Richmond, having some seventy cars, had at its lead end the cars for Second 209 and they cut off the Second 209 cars and a car for Rocky Mount classification and went on south in the yard; is that right? A. They cut off Second 209 train and a car for what?

Q. A car for Jacksonville which was in the Petersburg classification as it came out of Byrd Street? A. That is right. They cut that off and proceeded south.

Q. And moved on south? A. Yes.

Q. Then that left the cars for First 209 standing still astride of Clopton Road, did it not? A. Yes, sir.

Q. So that Clopton Road was protected from westbound traffic or traffic from the east by the cars of First 209 which were standing on Clopton Road? A. Yes, sir.

Q. And what you rode those three hopper cars back for was to protect it from eastbound traffic? A. Yes, sir.

Q. On Clopton Road? A. Yes, sir.

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Q. Were you or not giving signals to the engineer to continue his backward movement from time to time after you threw the switch and started to go back over Clopton Road?
A. I suppose so, yes, sir. It is natural for me to give him a back-up signal.

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Q. Did you continue that until you got off of the car from time to time? A. I don't remember, Mr. Townsend. I might have or I might not have. It wouldn't be necessary but to give one signal to back up. Sometimes I do and sometimes I don't.

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Q. About where did you get off on Clopton Road? A. I would say in the middle of Clopton Road.

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Q. What was your speed? A. Anywhere 4, 5 or 6 miles an hour.

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Q. Would it or not be natural for you to take a step or two with the motion of the train to the north as you got down off the train? A. I would have to.

Q. You would get thrown if you didn't? A. I just couldn't stop all at once.

Q. You would feel a forward movement and you would continue on that forward movement? A. Yes, sir.

Q. About how far do you think that forward movement would take you? A. Approximately across Clopton Road.

Q. To the north side of Clopton Road, do you think? A. Yes, sir.

Q. Did you see any light of any kind or any person standing on or near Clopton Road as you approached it? A. No, sir.

Q. If there had been a lighted flashlight shining on the cars that were standing on the southbound main line at that time when you approached Clopton Road, could you have seen it? A. I suppose I could have but my attention was mostly directed to eastbound traffic on Clopton Road.

Q. That is what you were there for, to protect it? A. Yes, sir.

Q. Would you have ridden that cut of cars up to Clopton Road except to protect the road crossing? A. No, sir.

Q. The movement that you made off of the hill southwardly down to the switch, through the switch and back up into slow siding northwardly— A. South of the hill and back into slow siding?

Q. Yes, was that a movement in road service or in yard service? A. I was in road service and I made the move.

Q. Was the movement made in road service? A. It was road service made within the yards.

Q. It was road service but made within the yards? A. Yes, sir.

Q. When you got down there you said that you arrived before Mr. Jones, the Yardmaster? A. As near as I can remember, I believe I did, yes, sir.

Q. And you got instructions from him as to what to do? A. Yes, sir.

Q. Was there anything unusual in his giving you the instructions as to what to do? A. No, sir; I received instructions there a number of times what to do.

Q. Are you under the direction of the Yardmaster when you get within the yard on that movement? A. Yes, sir.

Q. On the trip from Acca to South Rocky Mount on First 209, are you required to run backwards regularly on any portion of that trip? A. No, sir.

Q. However, when you were in the yard you were under the jurisdiction of the Yardmaster and you make such moves as he directs you to make? A. That is correct.

Q. In making up trains in Clopton Yard do you follow any regular routine or are you expected to go into any track or make any movements that the yardmaster directs? A. No, we are expected to make any movements the yardmaster directs to make.

Q. Is the use of any track in Clopton Yard an unusual movement so far as making up the train is concerned? A. I shouldn't say so.

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. You stated a moment ago that there was no unusual movement by the yard engine in the yard—

MR. TOWNSEND: He didn't say that. I asked him if he had been directed to go into any track would it have been unusual.

BY MR. SATTERFIELD:

Q. And you stated "No", did you not? A. That is correct.

Q. But it was unusual for you to be ordered back with the road engine, wasn't it, into slow siding? A. Not unusual. It was something I had never done before.

Q. Something you had never done before in the years that you had been with the company? A. That is right.

Q. And in the times that you had been in that yard? A. That is right.

Q. Mr. Dickens, do you tell the jury with a train running slower than 5 miles an hour you would have to run all the way across Clepton Road to kill the momentum that would be yours when you stepped off of it? A. I would say Clepton Road is about 8—I am no judge of distance. I say it is 8 or 10 feet wide and if I get off in the center of it, naturally I would take two or three steps to keep up with the movement of the car.

Q. Do you think you would have preferred a lighted yard on this night when Mr. Tiller was run down by the train that you were flagging over that crossing or would you have preferred that it be dark? A. If I had thought a lighted yard would have enabled me to see Mr. Tiller that night, I believe I would have preferred it.

Q. Wouldn't you have been able to have seen him standing there? A. I don't believe so. My contact with a lighted yard has been that it has blinded me. It has gotten in my eyes. If you work with the lights to the rear of you all the time, maybe it would be an advantage.

Q. So you are against lighted yards altogether? A. Yes, sir, absolutely.

BY THE COURT:

Q. Did Mr. Jones, the Yardmaster, give you any reason for his orders to make the back-up movement on slow siding? A. No, sir. I wouldn't ask the Yardmaster for reasons.

Q. He gave you none? A. No, sir. I just do as he directed.

BY MR. SATTERFIELD:

Q. Do you know why it was made—that move? A. No, sir.

Q. Did you know anything about the wrong classification of a freight car at Byrd Street which occasioned it? A. Not at that time.

Q. Do you know it now? A. I understand that a wrong classification had been made. I don't know it. I understand it.

RECROSS EXAMINATION

BY MR. TOWNSEND:

Q. Is there anything very unusual about an error in classification in coming into Clopton Yards? A. No, sir. I have made several yard days, what you might call yard days, that have been paid to me exclusive of my road work for setting off cars that were not in classification.

Q. You were not required to do it that night? A. No, we are not required to do it at all unless we are instructed to do so by the Dispatcher. If a car is in the wrong classification, it should have been in the right classification to start off with, and if it is in the wrong classification we are required to set Petersburg off and then get rid of our through cars before we get other Petersburg cars and then we are entitled to a yard day. I have made ever so many of those yard days.

Q. Did you make any move on this occasion that would entitle you to a yard day's pay? A. No, sir.

Q. I understood you to say that the movement you made was in road service? A. Yes, sir, road service working within a yard.

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Q. So the backward movements in the yard are very frequent? A. Yes, sir, yard or road. It is frequent but not regular movement, backing up a cut of cars. There is nothing regular about it.

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RE-REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. But you have on some occasions with the road engine made some yard movements in Clopton for which you were paid? A. No, sir, not in Clopton.

Q. Where? A. I have made a yard day at Weldon, North Carolina, and I have made a yard day at Petersburg, Virginia, and I have made a yard day at Acca.

Q. I didn't understand you to say that you had done it at Clopton Yard? A. No, I haven't done it at Clopton.

Q. The road engine has mostly been out of the way down on pass track No. 1 instead of doing any movements of any sort? A. We might be on pass track No. 1 or further on down in the yard in the clear on the main line.

Q. Making no movement at all? A. In the clear.

Q. But this time was it necessary for your road engine to aid in classifying this train in moving those three Weldon cars as it did back into slow siding? A. We didn't move three Weldon cars.

Q. Three Petersburg cars. A. I had to move the three Petersburg cars into slow siding. The yard engine, if it had done it, it would have been a yard crew making a road day.

Q. Whoever did it, they were aiding in classifying that train, weren't they? A. Not in classification of the train.

Q. They were not? A. I don't think they would be aiding.

Q. What were they doing in pushing it around? Some-

body had to push it, either the yard engine or road engine. A. Make the three Petersburg cars to get in the clear so the yard engine could make the correct classification.

Q. Weren't you already in the clear down there south of the crossover where the Yardmaster has originally sent you? A. No, sir.

Q. Why not? A. Because the yard engine had to make a move through that crossing.

Q. You were past the crossover and over it. They didn't have to go down south of the crossover? A. I believe that the yard engine had several cars behind it and in order to get out of the vision of the yard engine to the yard crew we had to move out of the way.

Q. Get out of what? A. The vision.

Q. The vision? A. Of the yard engineer to the yard brakeman and switchman.

Q. I thought it was dark in that yard that night? A. There was electric lanterns giving signals. You have to get out of the way so that the engineer could see a member of the crew giving a signal. If there was an engine and three cars blocking it, the signal wouldn't do any good. The engineer couldn't see it.

Q. It was your contention that because the engineer of the switching engine couldn't see the signals that would be given, you all came out of passing track No. 1 and went into slow siding? A. I don't say that is the reason. Maybe that was the reason, to get out of the vision of the yard engineer.

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ERNEST H. WAMACK, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. Are you an employee at the Atlantic Coast Line Railroad Company? A. Yes, sir.

Q. In what capacity? A. At the present time Yard Foreman.

Q. How long have you been in the employ of the company? A. Twenty-six years.

Q. Did you know the deceased, Mr. Tiller? A. Yes, sir.

Q. How long had you known him? A. About eight years.

Q. Did you see the deceased, Mr. Tiller, on March 20, 1940, the day of this accident? A. Yes, sir.

Q. Where? A. I saw Mr. Tiller first at Byrd Street Yard.

Q. Do you recall about what time? A. About 6 p. m.

Q. Was that before the yard engine had moved the train of freight cars, which is known as First Section 209, out of Byrd Street Station? A. Yes, sir.

Q. Were you assigned as a member of that crew, that yard engine crew? A. Yes, sir.

Q. As what, Mr. Wamack? A. As a switchman.

Q. That train left with the crew on it from Byrd Street Station. Did that include you? A. Yes, sir.

Q. Mr. Tiller? A. I don't know whether Mr. Tiller rode the train or not. I couldn't say.

Q. Did you see him after he got over in the yard that night? A. After we left the yard I didn't until we arrived at Clopton.

Q. Until you arrived at Clopton? Where did you see him then? A. I seen him after he had been hurt.

Q. You spoke with him at Byrd Street Station, did you not? A. Yes, sir.

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Q. How many cars did you all pull over there? A. Approximately, I would say, about forty.

Q. And you were riding on what part of the train? A. On the engine.

Q. On the tender or on the engine? A. On the tender.

Q. Is that the step that is at the back near the ground at the rear of the tender? A. That is right, on the tank. We call it the tank. We were riding on the safety rail.

Q. As your train came into Clopton Yard, what track was it using? A. Old southbound main line.

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Q. I will change the question this way : As you approached and went over Clopton Road, about how fast was he going southward on the southbound rail? A. I will say from 6 to 8 miles.

Q. Was any other train moving on any track nearby at the time you crossed over Clopton? A. Not to my knowing.

Q. Did you see the road engine that Mr. Myrick was engineer of? A. First 209 was standing on the hill as we crossed over the Clopton Road crossing.

Q. Where were you when the accident occurred? A. The accident? I don't know when it happened.

Q. And did you at any time see the road engine backing down into slow siding? A. After we passed the road crossing.

Q. Were they then backing into it? A. Into what?

Q. Slow siding. A. After the train had stopped and I had made the cut, I observed First 209 engine backing down into slow siding.

Q. After you made the cut what happened to the switching engine with the cars that it was holding onto? A. After I had made the cut I gave a signal, back-up signal, and that was proceeding south but the switchman, Mr. King, and Mr. Elke was at the switch which we were to enter and that was about probably six cars.

Q. So those cars with the switching engine backing back— was it? A. Yes, sir.

Q. When you came over from Byrd the tender was in front of the engine? A. That is right.

Q. In other words, the switching engine didn't come over from Byrd headon? It had its head to the cars and the tender was the leading end of the movement? A. That is right.

Q. Those cars moved, did they not, at or about the same time that Mr. Myrick's engine started backing into slow siding? A. They were pulling out. After we had made this cut, pulling out, I would say they were both making the movement at practically the same time.

Q. They were passing in opposite directions? A. Yes, sir.

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Q. How much of your time have you been assigned to yard service in Clopton? A. My assignment is daily that I go to Clopton. I have different assignments. Some of them you will probably be working in Clopton Yard every day for thirty days and then again it may be a time that thirty days we wouldn't even get to Clopton Yard.

Q. Have you averaged as much as half of your twenty-four years working in Clopton Yard? A. I think that would be a very good estimate.

Q. Have you ever been a member of the road engine crew of First 209 from Acca? A. Yes, sir.

Q. Have you ever in your whole experience on that yard known the road engine of First 209 to make a back-up movement similar to the one that was made on the night of March 20, 1940? A. I can't recall any specific instances that I made that move as far as backing up.

Q. You cannot recall a single instance? A. No, sir, I can't recall.

Q. Did it ever make such a move while you were a member of the road engine crew of First 209? A. No. At the time I was a brakeman on 209, as we term it, the train wasn't made up in that way. It was made up at the lower end of the yard, the south end of the yard instead of the north end of the yard.

Q. What was the usual routine movement that was made by the road engine when it came over to wait for the making up of the train by the switching engine from Byrd Street? A. The usual move would be that the road engine of First 209 would cut off, probably the engine by itself or probably one to ten cars, and they would get out of the way so that the yard engine could complete the classification of the train.

Q. To get out of the way where did it usually go? A. Sometimes the southbound main line, sometimes No. 1 track, sometimes No. 2 track which paralleled each other.

Q. Is that south of the crossover? A. That is south of the crossover.

Q. Is that south of Clopton Road? A. That is south of Clopton Road.

Q. Is that south of the switch that it would have to come into if it were going to back up into slow siding? A. Yes, sir. All of those movements would be south.

Q. Did you on any occasion that you can recall, when you were working in yard service and 209 was being made up, observe the road engine make a back-up movement such as was made that night on March 20, 1940? A. I have observed from time to time over a period of years 269, after waiting a certain length of time, would back down through the lower siding and probably go to the water tank or it is possible that he would back down in slow siding to let another train go up the main line, the old line that he was holding.

Q. Weren't they usually south of the crossover—the road engine? A. If he backed down the slow siding to go to the water tank, it would have to be a northward movement.

Q. If he was south of the crossover, wouldn't he be out of the way? A. If he was south of the crossover!

Q. Yes. A. Yes.

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Q. I am not asking you that question. I am asking you from your experience was that a usual or unusual move for that engine that night? A. Unusual move?

Q. Yes. A. They seldom ever backed down there if they have anywhere else to go.

Q. Are you acquainted with any rule of the company which deals with proper flagging, requiring the man on the lead end of a back-up movement to get off of the lead end and walk across the crossing? A. Yes, sir, we perform that duty.

Q. Is that a rule of your company? A. I wouldn't say it is in the rule book but it is a bulletin issued.

Q. Has it been posted on the bulletin boards of the Atlantic Coast Line? A. I think it has, yes.

Q. Do you recall reading it on the bulletin board? A. I recall reading it. That is where I got my information, yes, sir.

Q. Will you explain to the Jury what a bulletin board is in a railroad yard office? A. A bulletin is a supplement to the rule book. It supersedes the rule book.

Q. When did you read the bulletin that I have asked you about? A. I just can't recall the year but I would say about 1918 or '17.

Q. What did that rule, promulgated by being posted on the bulletin board, require? A. It required that approaching public crossings, unless protected, that it should be preceded by a flagman to flag over the crossing.

Q. Preceded by a flagman and what was he supposed to do? A. Stop the traffic.

Q. What about the train? Was it to move while he flagged the crossing? A. They come to a full stop before approaching the crossing. You come to a full stop when approaching a crossing. Before crossing that crossing you have a flagman in the middle or near the middle to protect the highway and then when it is clear you proceed.

Q. Was that a continuing rule of the company on March 20, 1940? A. It was still in practice, yes, sir.

Q. Was that a public highway, Clopton Road? A. Used by the public.

Q. Was it protected by a watchman or by signal flags of any sort? A. No, sir.

Q. Are you acquainted with the rules issued by the company in its rule book? Have you got your rule book with you? A. No, sir. Generally I am acquainted with them.

Q. They are issued to you and they are serially numbered so they keep tab on to whom they are issued; is that not a fact? A. That is right.

Q. How often are you required to go over these rules yearly to familiarize yourself with them? A. Twice a year.

Q. Is there any stated time that this examination takes place? A. I don't know but I think the I. C. C. requires the company to have a review of the rule book among the employees twice yearly.

CROSS EXAMINATION

BY MR. DENNY:

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Q. Is that a bulletin that applied all over the line or was that a bulletin that applied to the corporate limits? A. It is a bulletin that applied to Richmond yard.

Q. By Richmond yard do you mean the part within the corporate limits or all the way down to Falling Creek?

A. All the way down to Falling Creek. The yard limit board is beyond Falling Creek.

Q. Who is it that issues a bulletin of that kind? What official? A. Well, it could be the General Yardmaster, Terminal Trainmaster or the Superintendent.

Q. Mr. Murchison, I believe, is Superintendent and was Superintendent at that time, was he not? A. At the time this bulletin was issued, I don't think Mr. Murchison was Superintendent. I think Mr. E. P. Laird was Superintendent.

Q. So if Mr. Murchison did not become Superintendent until around about 1934, is it your opinion that that bulletin was issued prior to 1934? A. 1934?

Q. If Mr. Murchison did not become Superintendent until 1934, is it your opinion that the bulletin was issued prior to 1934? A. I think the bulletin was issued prior to 1934 but I think that the bulletin was issued over the signature of Mr. E. P. Laird and, just as I said, it would imagine it was somewhere between '37 and '38.

Q. Mr. Laird preceded Mr. Murchison as Superintendent, didn't he? A. Yes, sir.

Q. And since Mr. Murchison became Superintendent no bulletins on matters of that kind had been issued by Mr. Laird? A. That is right.

Q. You have said that your recollection of this is that it called upon the engineer to stop and a trainman go on the public road and flag it over unless the crossing was otherwise protected. If astride the crossing on a parallel track there are cars standing so as effectively to block the

crossing, is that crossing protected or is your interpretation of the rule, as you recollect it—

MR. SATTERFIELD: I am going to object at this point. I think the witness can state what the rule is and I don't think that it is proper for him to say what his interpretation of the rule is. He can state what the rule is and what he has done, if anything, under the rule but I don't think he is called upon to pass upon either the efficacy of the rule or what it means except to state what it is.

MR. DENNY: I think, if the Court pleases, that this witness is testifying from memory concerning a rule which he cannot quote and that I have a perfect right to ask him whether the rule as he recalls it applies to a particular situation. In this particular case the evidence shows that Clopton Road was blocked and I think I have a right to ask him whether the rule as he recalled it would have required stopping and flagging over when Clopton Road was blocked.

THE COURT: Objection overruled. Go ahead.

A. What was the question?

BY MR. DENNY:

Q. I will state the question again. As you recall this rule, would it on this night have been required the engine of First 209 to stop before backing cars across Clopton Road in view of the fact that the crossing was completely blocked by part of it standing on the southbound main line and the fact that Dickens was right at the lead end of the back-up movement with his lantern? A. A crossing, in my opinion and my daily duty, if it is blocked, if there are three tracks and one of the tracks is blocked, it is sufficient evidence to the public that he can't get by and I will cross the other tracks without protection.

Q. Without stopping? A. Without stopping for the crossing, yes, sir.

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Q. Do you under those conditions have any rule that

would have required you to stop, go out on Clopton Road and flag the train over? A. I have answered that question previous to that. If that crossing was blocked I assume that I have a perfect right to switch over it or make any movement on the other track that I see fit.

Q. I understand you to say, Mr. Wamack, that the yard engine coming from Byrd Street was backing up pulling its cars and you and some of the rest of your crew were standing on the little platform or passageway at the rear end of the tender which would have been right at the very front of your movement. Am I correct in that? A. Yes, sir.

Q. Who was on that tender with you? A. Yard Foreman Ellke and Switchman King.

Q. The engineer and the fireman were, of course, in the cab? A. That is right.

Q. And that made up your whole crew, did it not? A. That is right, engineer, fireman, conductor and two switchmen.

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Q. How far did your engine go south of Clopton Road before stopping? A. How far did the engine go?

Q. Yes, about how many car lengths as an estimate? A. I would say about 22 cars.

Q. After your engine came to a stop did you receive any instructions from anyone? A. Our move in leaving Byrd Street Station was that we was to go to Clopton as we were talking about and then we cut off a cut of cars ahead of First 209. Then we proceed to the lower end of the yard. Arriving at Clopton, I dropped off to make that cut and I was informed by the Yardmaster, W. J. Jones, that he had a car to cut out and told me the number of the car and where it was. That car had to be placed on First 209 train standing on the hill from Acca. That made two more cars than I would ordinarily have held to. I cut that car off and made that move.

Q. About how many car lengths south of Clopton Road was it that you made this cut? A. About five cars.

Q. There is nothing unusual in your having to cut off a single car and push it around in the make-up of this train, is there? A. That is my duty from the time I go on duty until I get off.

Q. You are doing that constantly? A. Constantly, yes.

* * * * *

Q. After you had made your cut on southbound main line here about five car lengths south of Clopton Road, your yard engine with about 22 cars pulled on down south and left the rear portion of that train standing astride Clopton Road, didn't it? A. That is right.

Q. What did you do when your yard engine and those front 20 or 25 cars pulled out? A. What did I do?

Q. Yes. A. After making the cut, cutting off and leaving those cars there, I walked over on the west side of the line of switches to go up on the hill.

Q. You mean on the west side of the southbound main line? A. Yes, sir.

Q. Into the area between the southbound main line and slow siding? A. That is right.

Q. When you stopped over there what was the road engine doing? A. The road engine was, as well as I can remember, in motion to make a back-up move. I was coming in on a forty-five.

Q. What do you mean by coming in on a forty-five? A. I mean the five car lengths that I was, I would have to walk down from the end of my train that was left to walk over to the switch so I was above the movement this engine had came off of with the three cars off the old line and was in a position to back down.

Q. As you stepped across approximately five car lengths south of Clopton Road, was that movement then going on on slow siding right opposite you? A. That is right.

Q. In other words, if you had tried to step on slow siding you would have walked right into Mr. Myrick's movement, wouldn't you? A. The five cars above here puts you above

this switch. That is where I gave you the idea of walking on a 45. I would say his engine had made the move and had passed the three cars above that switch, that switch right there, and then when I walked over he was backing down.

Q. In other words, five car lengths takes you down in the neighborhood of this switch? A. Just about probably 35 or 40 feet above it.

Q. As you stepped across there, right in front of you was Mr. Myrick's engine making his back-up movement? A. The engine had passed me approximately. It was backing down. He had passed me probably 10 to 15 to 20 feet.

Q. And at that time that he was backing up the rear portion of the cars you had brought from Byrd Street were standing still? A. That is right, where I left them at.

Q. Mr. Wamack, as you stepped across into the area between the southbound main line and slow siding, you were planning to go up on the hill to make the coupling to be made up there, were you not? A. My idea was to throw the switch, to see that the switches were lined up.

Q. Did you come in south or north of that switch? A. I come south of the switch.

Q. So that to go to the switch you had to walk right straight up toward Clopton Road, north toward Clopton Road. Did you see, when you got into that area with your face toward Clopton Road, any sign of a man with a flashlight up around Clopton Road or did you see any sign of the beam of the flashlight? A. No.

Q. I understand for a long period of time, for a number of years, about half the time you have been working in Clopton Yard either with the yard engine or with the road engine and had been there numerous times when First 209 was being made up; is that correct? A. Yes, sir.

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Q. Is there any regular routine followed each evening? A. No. At the present time we make it up on No. 1 track, in No. 2 track, No. 3 track and No. 4 track and sometimes

northbound main line and possibly southbound main line.

Q. Is there anything unusual in the make-up of freight trains in the yardmaster directing movements to be made, convenient movements to be made on any track that there is there and open? A. Nothing unusual about that, no, sir.

Q. I speak of the period prior to the accident to Mr. Tiller. I understand you to say that you have seen on a number of occasions the road engine back into slow siding; is that correct? A. Yes.

Q. On a number of other occasions you have seen the road engine go into No. 1 track, have you not? A. Yes.

Q. No. 2 track? A. Yes.

Q. On down to the south end of the yard? A. Yes.

Q. Indeed, you have seen practically every track that is in the yard used in the make-up of that train, have you not? A. Yes, sir.

Q. Mr. Wamack, was the movement made by First 209 in getting out of the way, that is coming down off of the hill and backing into slow siding in order that the yard engine might make up the train, a movement by 209 road engine in yard service or was it a movement in road service? A. That movement was road service. We have an agreement, in fact, a labor agreement, that a road man can't make any moves within yard limits. In other words, he can't make any switches in yard limits.

Q. He gets paid extra if he does, does he not? A. Yes.

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. You were answering some questions, a number of them, a moment ago about the regular routine. I understood you to say in response to a question asked by Mr. Denny, or a number of questions, that there was nothing regular about the routine over there in making up 209 in the yard. That is true, isn't it? A. That is true.

Q. But does that apply to the movements of the road

engine. First 209? A. To the movements that 209 makes at the time of this accident?

Q. At the time this train is made up, isn't it a fact, when 209 is being made up for the road engine to go south with it, that there is a routine movement for the engine that Mr. Myrick was handling that night? A. At that time?

Q. Yes. A. The routine was that 209 would cut off and either use the main line, No. 1 track or No. 2 track, if open.

Q. That was routine? A. That was generally what they did.

Q. Isn't it a fact that the unusual movement was the back-up by that road engine into slow siding? A. Well, if I interpret the word "unusual", I don't know how you ought to term it.

Q. Unusual for 209, the road engine—not unusual for the yard engine but wasn't it unusual for the road engine to make that move? A. The road engines generally went in No. 1 or 2 or the southbound main line.

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Q. You have described to the jury the usual movement of the road engine and I will ask you now, Mr. Wamack, was it a usual movement of the road engine to back into slow siding as it did on this night? A. The usual move of the road engine is to go down in No. 1 which ordinarily is always open. Should No. 1 be blocked, No. 2 is open.

RE-CROSS EXAMINATION

BY MR. DENNY:

Q. When you say the usual movement is to go into No. 1, do you mean it goes into No. 1 or No. 2 a majority of the times? A. That is right.

Q. You do not mean that it goes in there with such uniformity that it is almost unprecedented for it to use other tracks? A. Well, there is a series of tracks.

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BY MR. DENNY:

Q. Can you give the jury an estimate of the number of times per month along about this time that Mr. Tiller was killed that the road engine might go into slow siding? A. I happened not to be out there every day.

Q. According to your experience out there. A. It seldom ever did.

Q. Mr. Wamack, you testified in this case before, in September of 1941, didn't you? A. Yes, sir.

Q. I read from your testimony taken at that time, page 61, direct testimony in response to questions, I think, of Mr. Satterfield:

"Q. Mr. Wamack, in all your experience there in the yard was not that an unusual movement made by Engineer Myrick that night? A. No, I wouldn't say it is unusual. It has happened before.

"Q. How often before? A. I wouldn't be able to estimate that but quite often we make that move.

"Q. How often have you been on that particular run handling those trains 209? A. Ever since 1921.

"Q. How many times in the last two or three years? Mr. Tiller was injured in 1940. Let us say for the years 1938 and 1939 or two years prior to 1940, how many times would you say a year that you were on that assignment? A. Well, I could easily estimate half of the time.

"Q. Half of the time? A. Yes.

"Q. How many times would you say per month you would make that move to get a car out of the wrong classification and use that slow siding in a back-up movement as Engineer Myrick did on that occasion? A. How many times would we make that movement?

"Q. Per month that you would make that exact movement? A. We have about half of the time a classification to make on the two trains.

"Q. I am not speaking about since 1940; I am speak-

ing of prior to 1940. A. I don't think I would be able to say as to how many times.

"Q. I mean roughly, from your recollection, how many times would you say you would do it per month, the exact move that Engineer Myrick made on that evening, March 20, 1940, two years prior to 1940? A. I would say it may happen ten times a month or it may happen fifteen times per month or it may not happen in two months.

"Q. Let us take it over a period of six months. Would you say it averaged more than three or four times a month or two or three times a month, year in and year out? A. Well, it would be hard for me to say."

Two years ago when you were on the stand you testified that for a period of two years approximately prior to Mr. Tiller's death the back-up movement might be made into slow siding ten or fifteen times a month and again it might not be made for a month. Now you say it was very rarely made. Which time do you think you were the more likely accurately to recollect, two years ago or today? A. I just can't term the word "Unusual". I don't see anything unusual about that. I don't understand the word you all term "unusual". In other words, to me the tracks are there and we use them any time we want to.

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Q. Do you think two years ago when you testified that along during the period immediately prior to Mr. Tiller's death, two years prior thereto, there were occasions when a train was backing up in slow siding, Mr. Myrick's train, a road engine, ten or fifteen times a month and other times it might not go in there for a month at a time? A. That is right.

RE-REDIRECT EXAMINATION

By MR. SATTERFIELD:

Q. Mr. Wamack, Mr. Denny is attempting to contradict you on the testimony that you made here two years ago. My

attention has just been directed to this. You were asked this question about the unusual movement made by Engineer Myrick, and I want to ask it to you again:

“Q. How many times would you say per month you would make that move to get a car out of the wrong classification and use that slow siding in a back-up movement as Engineer Myrick did on that occasion?”

What did you understand that question to mean? A. I understood the question was he was asking about the moves that First 209 made, that is Mr. Myrick's engine, and then you proceeded with a question as to what I did.

Q. What do you mean by “I did”—in what capacity?

A. As a switchman or conductor in charge of a crew. As to using those tracks, I make moves over there practically every tour of duty I work.

Q. Were you referring to the yard engine? A. To the yard engine.

Q. I will ask you the same question and only refer to the road engine. Was that an unusual movement to be made by the road engine, not the yard engine? A. That unusual move, just as I say,—I still don't get the “unusual” but the usual move would be that the engine would take No. 1 track, No. 2 track or the southbound main line.

Q. And not slow siding—the road engine? A. Well, it is possible that they use it because the track is there and we use any track.

Q. How many times did you ever use it with that road engine? A. I don't ever recall ever using it with the road engine.

Q. Speaking of your own experience, you don't recall in the time you have been with the Coast Line that you have used that slow siding when you were a member of the road engine crew; is that correct? A. I have only been about seven times on First 209 out of Acca.

Q. Whatever time, it is the only time you have ever had any experience with it? A. At the time I was going there

the train was made up at the lower end of the yard. It wasn't made up on the hill.

Q. Wherever it was made up, whether it was made south of Petersburg or north of Petersburg, how many times have you seen that road engine go in there with cars as Mr. Myrick went in there with this road engine on the night that Mr. Tiller lost his life? A. I couldn't recall any time any more than any definite number of times. I have seen them back down to the water tank after waiting a certain length of time.

Q. I am talking about when 209 was being made up. A. I can't recall it going in there that I know of.

RE-RE-CROSS EXAMINATION.

By MR. DENNY:

Q. What did you mean then when you testified to the jury before—I will read again the question and answer:

“Q. I mean roughly, from your recollection, how many times would you say you would do it per month, the exact move that Engineer Myrick made on that evening, March 20, 1940, two years prior to 1940? A. I would say it may happen ten times a month or it may happen fifteen times per month or it may not happen in two months.”

Did you mean that the road engine, sometimes as much as ten or fifteen times a month, would back into slow siding and sometimes the road engine wouldn't use it for two months? A. I understood the question to be how many times that I would make that move.

By MR. SATTERFIELD:

Q. As what—yard or road? A. As yard engine.

By MR. DENNY:

Q. Have you seen the road engine make those moves into

slow siding? A. I have seen them back down to the water tank, yes, sir, and I have seen them back in the clear.

Q. And I suppose you have come through on your yard engine backing in there when the southbound main line and other tracks have been blocked, have you not? A. Yes.

Q. Have you seen the road engine back in there when No. 1 and No. 2 were blocked? A. I can't recall any time.

Q. Mr. Wamack, have you worked both in lighted and unlighted yards? A. Yes, sir.

Q. Will you state from your experience as a trainman whether you find the work is more easily and you think more safely done in a lighted yard or in an unlighted yard, from your experience? A. In my experience I prefer a dark yard.

Q. Why? A. Well, in a dark yard if you go on a tour of duty at 4 p. m. in the afternoon and it gets dark and your eyes become accustomed, you can watch everything. On a lighted yard if you come out of a dark yard into a lighted yard you are blind, you can't see where you are going.

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Q. What are the difficulties, if any, do you notice in a lighted yard? A. Cutting cars and you walk into a direct light that is focused down on both ends of the yard and your eyes are not focused to it and you really can't see and you turn around away from that light and you are in the dark. You can't see anywhere you are going. You just have to judge and feel where you are going.

By MR. SATTERFIELD:

Q. Will you tell the jury where Tiller was accustomed to stand when he would check those freight cars as they went through the yard? A. What do you mean? In pulling out of Clopton?

Q. Yes. A. My observation over a period of years is that Mr. Tiller always dropped off about fifteen cars, 40-foot car lengths, away from Clopton Road crossing and anywhere from there up to the road crossing I have observed

him dropping off there when we was making that move as we did then because he practically would be at the head end of the train and then they would let the train pull by and he would walk back to the rear.

Q. Where was that position with reference to slow siding?

A. On the slow siding on the west side of the southbound main line, anywhere between fifteen—he generally would get off before he got to the switches.

Q. Between the tracks or on the tracks or where? A. He would have to get off between the slow siding and the southbound main line on the west side.

Q. Do you know any particular reason why this move was made that night on slow siding? A. No, sir, I don't know.

Q. You do not know why it was made? A. No.

BY MR. DENNY:

Q. Mr. Tiller, according to your observation, followed a regular routine in his work there in the yard? A. No, sir.

Q. Have you seen Mr. Tiller doing his work at almost every place in that yard? A. Yes, sir.

Q. Did Mr. Tiller come to that yard by the same means every night? A. Clopton Yard?

Q. Yes. A. No, sir.

* Q. What were the different ways Mr. Tiller came to the yard? A. I have seen him drive his own automobile and I have seen him come out—not come out but I have seen him ride on the train and go back with Mr. Jones, the Yardmaster.

Q. Have you seen Mr. Tiller checking the seals of the cars of the train he was to guard all the way from Byrd Street, at various places from Byrd Street down to the south end of Clopton Yard? A. Yes, sir.

Q. You didn't, unless you happened to see Mr. Tiller, know what part of the yard Mr. Tiller was in. Did you have any reason to know what part he was in? A. No, sir.

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C. D. HUBAND, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. Are you an employee of the Atlantic Coast Line Railroad Company? A. Yes, sir.

Q. You are employed by that company in what capacity? A. As a yard conductor. At one time it was foreman but the old term is yard conductor.

Q. How long have you been an employee of the Coast Line? A. Thirty-five years last March.

Q. During that period of service with the Atlantic Coast Line, how much of it has been spent in service in Clopton Yard? A. Clopton Yard is a mixture of the Richmond yard. We call all Richmond yard from Richmond at Byrd Street to Falling Creek and we have Richmond yard, South Richmond yard, Clopton Yard and Falling Creek but they all come under the same territory as Richmond yard.

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Q. Of the time that you have been in the service (I believe you said thirty-five years) let us restrict it by saying how much of those thirty-five years have you spent in service in the area of Clopton Yard where Clopton Road passes over the railroad track near Meadow? A. I was clerk up until 1915, November, 1915, when I went in braking service and I had clerked at Clopton Yard up to that time and after 1915 when I went braking, naturally we would go through all of this territory at all times. When we start out on a yard, that is our yard—in other words, take Clopton Yard would take us to Falling Creek Yard and that is the way we worked but it is all within the one yard limit. It is the only territory assigned so we will know exactly where to get the cars or take them from.

Q. Since 1915 you have been in road service? A. In switching service.

Q. As distinguished from office work? A. Yes, sir.

Q. Since 1915 have you had assignments of duty in Clopton Yard proper? A. I was the Yardmaster during the last World War in Clopton Yard but exactly the term of it, I can't say. It was somewhere in the neighborhood of near about a year that I served as Yardmaster at Clopton alone.

Q. Since then what have you been doing? A. Since that time I have been working as yard foreman up until 1929 and was cut back to braking and still braking within Clopton Yard territory and running crew some and running crew regular since about 1936 or '37.

Q. Then in the last fifteen years you have been in and out of Clopton Yard a good deal? A. Yes, sir.

Q. Have you been called for service with 209 that comes out of Byrd Street Station in any of that time? A. I worked the assignment from 3 to 11 about three years and built 209 up practically every day except some days I would get off. We all get off sometimes to take recreation, but in the thirty-day period I would say I would make around twenty-five or twenty-six days.

Q. On that assignment? A. Most of the time, yes, sir, I was on building 209 train up.

Q. Were you assigned for duty on the switching crew or road engine crew? A. No, I was on yard switching. I have no rights on the road at all.

Q. Are you familiar with the regular routine followed by the road engine when it comes over with its section of cars from the R. F. & P. yards at Acca incident to the making up of First 209 for South Rocky Mount, North Carolina? A. Well, sir, I will have to answer that and say as long as I have been there in regular service that I have put in there, I am used to all the moves that we make on 209 in between Clopton and Falling Creek.

Q. What is the usual move that the road engine makes when it comes over with a cut of cars and stops on the hill to get its first orders from the Yardmaster incident to mak-

ing up train 209? A. That is kind of a long story. You want it all, I reckon?

Q. Yes.

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Q. Will you please speak of it as the road engine. The road engine would do what? A. First 209 road crew would pull down to the road crossing at Clopton. That is approximately, I reckon, 150 or 175 feet from the switch but would clear this public road crossing, so they would stand there until they get instructions what move they should make in order that we should classify their cars in proper classification. So, as I tell you, before I left Richmond, when I get off there, if the Yardmaster hasn't arrived I instruct the road crew how many cars to hold onto, if any, and where to go if the situation demands where he goes, and most of the time we let him go down in No. 1 track south of the cross-over. In some cases where No. 1 was blocked we let him go in No. 2 track and leave room there and then we would make the switch in his train and classify his cars so that when he coupled to his cars on the main line his train would be classified so when he arrived at Collier, which is the Petersburg destination, he could set off his Petersburg and hold onto his Weldons—did you get me right on that move?—set off his Petersburgs and hold onto his Weldons and then pick up what south cars he had to pick up from Collier which would fill his train out into Rocky Mount and that was the usual move there.

Q. Your yard engine assembled the train for the road engine? A. That is right.

* * * * *

Q. I will ask you this question: Was it a usual movement for the road engine to back up with some cars in a back-up movement and back down into slow siding? A. No, sir.

Q. Have you ever heard of that movement being made? A. I wouldn't like to say that I haven't heard of it being made because we do make moves on the yard very irregular

but it was a very unusual move if it was made that way that night. I couldn't say it was done that way and I don't know why the conditions were made that way. If I had been there and No. 1 had been open or No. 2 had been open, I would have put him in one of those tracks. I don't know anything about the conditions of why the movement was made that way that night.

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Q. Did the railroad company have any difficulty with thieves stealing property between Byrd Street Station and Clopton Yards on some occasions? A. Yes, sir, they did, on several occasions and Mr. Tiller asked us and Mr. Angle—Mr. Angle is another detective—asked us to help them if we seen any shoe boxes or anything laying in our territory because they had found thieves had put a ladder down off the side of the car and broken into the car.

Q. What kind of ladder? A. A rope ladder on top of the cars and broken the seals on the run. That was only hearsay.

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Q. Mr. Huband, will you tell the jury whether or not you are familiar with any rule of the company which required a man on the leading end of a back-up movement going over a highway crossing which was not protected by a watchman or some set of signals? Do you know of any such rule of the company? A. Yes, sir.

Q. Will you tell the jury what you know about that rule, sir? A. Well, the rule is something that I can't quote out and out because—I know the rule and know how to live up to it but to state the rule exactly—it says, "Except when switching in yards, a lamp by night or signal by day or trainman by day"—I have forgotten exactly how that reads—"should be on the leading car except in switching in yards but when the move is made over grade crossings not protected by a watchman, trainmen must protect the crossing."

Q. Does the rule require the stopping of the train and flagging it over? A. That rule there does not say "stop the

train." That rule does not say "stop." It says it must be protected by trainmen.

Q. All the way across the crossing? A. I should say that it would mean all the way across the crossing. It says the trainmen must protect the crossing.

Q. Where did you first become familiar with this rule? A. I first became familiar with it when I filled out the rule book in 1915 of the yard conductor. We have to fill that examination before we pass from trainman to conductor.

Q. Do you know anything about a rule that was reissued by the company and made a part of the rules by bulletin?

A. That same rule regarding shoving cars over crossings, sometime back in Mr. Darrell's time—Mr. Darrell was Superintendent of transportation.

Q. When was that? A. Eleven or twelve years ago, around 1930, in the '30s, Mr. Darrell came up here to a safety meeting and in the safety meeting each employee there is called on to give his sentiments in regard to the safety items and the road crossing proposition was brought up at the time, that they ignored our signals and run on across ahead of us and Mr. Darrell called attention to the rule and said that was taken care of and it was up to us to be safe because we were supposed to protect these crossings and he issued later, or Mr. Laird, our Superintendent, reissued a bulletin instructing us that this rule was in effect and we must live up to it and it went a little further and said we must stop at road crossings and flag them if they are not protected by a watchman or signal indication.

Q. What does that mean—"Stop at road crossings not protected by a flagman"? What do you have to do to flag it across safely? A. Our construction of it is that we stop before we touch the crossing and get down and get on the crossing and stop all vehicles or people crossing and then flag our own train across.

Q. Did you understand that rule to be in effect when one side of the road was blocked by a train or would that affect it? A. Well, sir, I don't think it would protect me if I hit

someone if the road crossing was blocked on one track and I didn't protect the other.

Q. What do you mean—it wouldn't protect you? A. Say this train was on the southbound track that night; if I had been moving on the other track and went ahead over the crossing and somebody or a car had run over that crossing and I had hit him up at that crossing, I don't believe it would protect me from being criticized for hitting him. That is my opinion of the rule. I do live up to that rule of flagging these crossings.

Q. Was any suggestion made to you by an officer of the company that the rule not be followed any further? A. When I was a local chairman handling grievances for the organization back about a year after this, there was some complaint made that it took us too long—

MR. DENNY: May it please the Court, I object to testimony of matters occurring since 1940. They have no pertinence to this case.

THE COURT: What he related happened in 1940?

A. No, sir.

BY THE COURT:

Q. When did it happen? A. It happened after this special instruction was issued regarding the flagging of these crossings by trainmen.

MR. DENNY: I understood he meant at the time Mr. Tiller was killed.

BY MR. SATTERFIELD:

Q. What was said to you? Did anyone talk to you about this—an officer of the company? A. Yes, sir.

Q. Was who it? A. I was getting to that but the gentleman stopped me. In handling these grievances of the trainmen, that it was too long and our Yardmaster's idea of

getting from Clopton to the shops with cars ahead of him—he explained that he had to stop at each one of these crossings and flag and the Yardmaster took issue with him and told him it wasn't necessary.

Q. Who was the Yardmaster? A. Mr. O. S. Marsh. I handled the case with the superintendent the next day, Mr. E. P. Laird, and Mr. Laird asked me was it necessary to stop at all the crossings and I admitted that it might not have been necessary but the rule had been bulletined and we must live up to it. He said, "Couldn't you stand on the car and put your fingers in your mouth and whistle?" I said, "No, sir; I will have to admit as a boy I couldn't whistle and I can't yet," and he didn't like it at all because we insisted that we were going to stop.

Q. Is that rule still a rule of the company, so far as you know? A. So far as I know, we flag these crossings where we have cars ahead of us and no watchman or no signal is working, yes, sir.

Q. When these bulletins are issued are they posted from day to day in the office of the railroad company? A. Our rules tell us before we go to work each day or take our tour of duty, we must read the bulletin board and accustom ourselves thereto.

Q. Do you have to do anything else in connection with it? A. We have to sign our names to these bulletins and the date and time that we read them.

Q. Each day? A. Yes, sir.

Q. Was this rule in any way a part of that bulletin board? A. Yes, sir, it was at that time. I haven't seen it for a long time.

CROSS EXAMINATION

By MR. DENNY:

Q. Mr. Huband, have you a copy any place of this rule to which you refer? A. You have the only copy that I have had today and I have a copy at home, yes, sir.

Q. You are referring to the rule book? A. No.

Q. I am referring to the rule posted on the bulletin board.

A. No, sir, I am not allowed to take those bulletins off of those bulletin boards. They are put on there by the superintendent or the yardmaster and I only have to sign them. I am not allowed to take that copy.

Q. Did you mean to say that a higher official of the company in the service seriously suggested to you that you violate the rules of the company? A. Yes, sir, when it comes to that whistling at that road crossing, I will tell you that he did.

Q. And how long ago was that? A. I stated a while ago it was in the '30s. I haven't got the date right now.

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A. Mr. Marsh was the Yardmaster and Mr. Laird the Superintendent.

By MR. DENNY:

Q. And the two of them suggested to you that you ought to violate this rule about protecting the road crossings?

A. I didn't say Mr. Marsh asked me to violate it. Mr. Marsh had us in his office for not violating it. Mr. Laird said that a whistle signal was a plenty.

Q. Was Mr. Laird then Superintendent? A. Yes, sir, of the Richmond division in Byrd Street Station.

Q. Mr. Murchison has been Superintendent since 1934, hasn't he? A. He has been superintendent a long time but I don't keep these dates.

Q. And this incident to which you referred took place prior to the time Mr. Murchison became superintendent?

A. Yes, sir. I didn't know Mr. Murchison at the time.

Q. Have you also worked at night in lighted railroad yards? A. No, sir, I have been to Acca in that lighted yard and got a train out of there.

Q. Have you been there often? A. Yes, sir.

Q. From your experience in working in these unlighted yards and in working in the lighted yard at Acca, which

type of yard do you find is easiest to do your work at night in and which type safest? Do you like the lighted or unlighted yard? A. Never having switched in a lighted yard, I wouldn't know that, but I know this: I can see farther and see a person further in a lighted yard but in a dark yard—I have only switched in a dark yard. In Acca we didn't switch. We would go over there and get in the cab on the train and come out.

Q. Do you know whether you can see the signals better in a dark yard or lighted yard? A. You refer to hand signals or drop signals?

Q. I refer to hand signals. You operate your trains at night by hand signal lamps, do you not? A. But you didn't say what kind of signals.

Q. You are correct. A. My experience is that unless you get direct within the ray of one of those lights in Acca Yard, you can see better in a dark yard—see a lamp further in a dark yard.

Q. Mr. Huband, assume that at about 7 to 7:15 on March 20th a cut of cars was standing on the southbound main line across the Clopton Road so that they had Clopton Road blocked and that an engine is about to back three cars north on slow siding across Clopton Road and that a brakeman holds on to the lead end ladder on the west side of the back-up movement with his lantern, riding it all the way to Clopton Road, he being, of course, on the engineer's side. Assume those conditions, the blocked road and the brakeman riding the head end of the back-up movement with his lighted lantern, would you say that that brakeman properly protects that crossing under those conditions? A. I would say the same thing I told you before that he protected that crossing from the west side because he was on the west side and he had four track lengths of clear track and he could see there wasn't anything coming.

Q. Then your answer to that question is that under those conditions a brakeman riding the head end of a back-up movement as I have described was properly protecting the

crossing? A. I think in the conditions with the crossing blocked so that nothing couldn't get to him on the east and he could see four track lengths, I should say, because the tracks are that wide (indicating) and it was perfect clearance from that road that he made a proper move in that one move, yes, sir, that he could see there wasn't anything coming in that direction from the west.

Q. If a brakeman did that, do you know of any rule of the company that he violated? A. Yes, sir, I believe I do.

Q. Let us have that. A. I believe he violated Rule 124. Special instructions say he must get down and flag it. I don't believe that would leave him in the clear. I am telling you the truth.

Q. What do you mean—Rule 124? A. I think it is Rule 124. Let us see which is the rule.

Q. Do you want to see the rule book? A. Yes, sir. I should have said Rule 103.

Q. Which is Rule 103? A. "When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the front of the leading car and when shifting over public crossings at grade not protected by a watchman, a member of the crew must protect the crossing."

Q. What do you mean by "protect the crossing"? A. I think the company is the judge of that and if I do not protect that crossing I am guilty of negligence.

Q. Do you protect the crossing when the brakeman holds onto the lead end of the back-up movement in a position with a light to wave and where he can see any traffic coming from the west with the east side blocked? A. I have already answered that question and told you in this case where there was clear vision from the west and he is blocked, he had properly taken care of that crossing.

Q. Mr. Huband, the evidence shows that on the night in question the road engine held to three hopper cars, came down off the hill and backed up into slow siding in order that the yard engine might push a car back up on the hill to

the Rocky Mount cars left on the hill by the road engine. Was that road engine, in its movement in coming down off the hill and backing into slow siding making a movement in road service? A. It was a road engine making a move in a yard limits to clear the train so that a yard engine could classify his train.

Q. Is the movement made by a road engine for that purpose a movement in road service or is it a movement in yard service? A. It is a movement in road service to avoid paying a yard crew day.

Q. In other words, if that had been a movement in yard service, the road crew would have to be paid, in addition to road rates, a minimum yard day? A. That is right.

Q. But on a movement of that kind that I have just described, the road crew would not get a minimum yard day? A. That is correct.

Q. I believe that you mentioned a little while ago that back up north of Clopton Road on slow siding there is a water tank, isn't there? A. Yes, sir, about forty car lengths from the road crossing.

Q. Have you seen the road engine backing up slow siding to go to that water tank? A. Yes, sir, many times.

Q. Have you seen on other occasions when you were there in Clopton Yard a road engine backing up into slow siding? A. Yes, sir.

Q. In completing the classification of First 209 at Clopton Yard, is it a fact that some nights you make one move and other nights you make other moves and still other nights you make still other moves? A. You are correct, sir, yes, sir.

MR. SATTERFIELD: I think we have a right to as who he means by "you".

BY MR. DENNY:

Q. I will divide it. Some nights does the yard engine make one series of moves and another night another series of moves and other nights other series of moves? A. We make moves according to the classification of trains and the cars we have got to cut in.

Q. And the fact that you bring out different classifications on different nights and a different number of cars necessitates different moves on different nights, does it not? A. Yes, sir.

Q. That is true of the yard engine? A. The yard engine is switching and that is what his job is, to switch.

Q. Is it also true of the road engine that some nights the road engine will make one type of move and another night it will make another type of move? A. Yes, sir, but it is generally right regular in the one move.

Q. Do you mean when you say "generally right regular" that a majority of the time it gets into the clear down to the south? A. It gets down to the south, yes. We generally try to make a straightaway move as much as possible in making all moves.

Q. You have acted as yardmaster out in this yard, I believe? A. Yes, sir.

Q. And there are times when, as conductor, you have directed the moves out there? A. Yes, sir.

Q. Your duty, if you are the person to determine what moves shall be made, is, first of all, to direct safe moves, is it not? A. That is right.

Q. And, secondly, to direct the most expeditious moves possible, is it not? A. Yes, sir, that is right.

Q. You try to make the smallest number of moves in the smallest amount of time? A. Every move is extra time lost, yes, sir.

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P. W. WRIGHT, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. GARY:

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Q. How long have you been with the Atlantic Coast Line? A. February 11, 1937.

Q. In what capacity did you first go with them? A. As fireman.

Q. And were you fireman from that time until March 20, 1940? A. Yes, sir.

Q. Were you the fireman on Mr. Myrick's train the night that Mr. Tiller was struck in Clopton Yard? A. Yes, sir.

Q. Where did you take that train? A. From Acca Yard to South Rocky Mount.

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Q. What time did you arrive at Clopton Yard, do you recall? A. It was around 7 o'clock.

Q. Was it dark? A. Yes, sir.

Q. Were the yards lighted in any way? A. No, sir.

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A. We took these three cars and came down here to clear this switch at slow siding and backed those three cars back across slow siding.

Q. Up into slow siding? A. Yes, sir.

Q. While you were backing up into slow siding were there any other trains on the yard? A. Yes, sir, the yard engine was coming up the southbound main line right here. The yard engine was bringing cars from South Richmond on the southbound main line.

Q. And was that engine proceeding with those cars on the southbound main line while your train was backing up into slow siding? A. Yes, sir, there was a movement of both trains.

Q. In opposite directions? A. Yes, sir.

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Q. What happened after you stopped your train in slow siding? A. After we stopped the train in slow siding I saw a little beam of light down just north of the crossing.

Q. Just north of what crossing? A. Clopton Road crossing and I walked over to the engineer's side and thought probably there was a car sitting over there shining its lights over there and there wasn't a car over there, so I got down off my cab and walked to the crossing to see what it was and I had a flashlight in my overalls pocket and I flashed it on

the flashlight and then I flashed it up the track and saw a man's cap and so I went back when I saw that to the engineer and told him what I had saw and asked him to come with me and we went back up there and he said, "Wright, you have got a flashlight?" I said "Yes," and he said, "Give it to me," and I gave him my flashlight and he went up the track looking and he saw the flashlight and Mr. Tiller's hat, it turned out to be, and his gun and then Mr. Tiller was at the rear car.

Q. On which side of the train were you, Mr. Wright, as it went back into slow siding? A. Well, the fireman's side is the left side of the engine and that is the side I was sitting on.

Q. On the left side of the engine going forward? A. Going forward.

Q. That would be on the right side of the engine going backward? A. Yes, sir, if you want to term it that.

Q. You were on the east side over on the side of the engine next to the southbound main line on which the other cars were shifted? A. Yes, sir.

Q. Did you help get Mr. Tiller from under the car? A. Yes, sir.

Q. Where was he? A. He was hung between the leading set of trucks on the leading car.

Q. Did you have any difficulty in getting him out? A. Yes, sir; his foot was hard to get out from between the frame of the truck and the wheel.

Q. Was he conscious when you got him out of there? A. No, sir.

Q. Did he regain consciousness after you had gotten him out? A. Yes, sir, he regained consciousness in a few minutes, I guess, after we got him out.

Q. Did he make any remark at that time? A. Yes, sir, he asked me who I was. He asked me what hit him.

Q. Any other remark? A. No, sir, not that I remember.

Q. What happened after that? A. Mr. Myrick and I bathed his face and when I went after water I run up and

hollered to somebody and told them that Mr. Tiller was hurt and came on back there and carried water there and washed his face and I stayed with Mr. Tiller while Mr. Myrick notified the Yardmaster and got the train out of the way.

Q. How long were you there?

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A. I wasn't there with him over ten or twelve minutes, I don't believe, before Mr. Jones called me to go to my engine and get my train out of the way.

Q. Did you then get on your train and go south? A. Yes, sir.

Q. Are you familiar with this rule book? A. Yes, sir.

Q. Do you have a copy of it? A. Yes, sir.

Q. Will you read Rule 24 to the jury. A. "When cars are pushed by an engine, except when shifting or making up trains in Yards, a white light must be displayed on the front of the leading car by night"—

Q. On Figure 18 there is a freight car being pushed by an engine by night with a white light on the front of the leading car at "A". Did the lead car of the movement that was being pushed into slow siding by this engine on the night of March 20th, when it struck Mr. Tiller, have a light of that kind on it? A. No, sir, there was not a light on top of it.

Q. Was there any light on it at all? A. The brakeman was on the engineer's side giving him a signal. That was the only light that was on it.

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MR. GARY: I will pass that to the jury and let them see Figure 18 in the rule book.

Q. Mr. Wright, was there any light on the rear of the locomotive that was pushing those cars backward into slow siding? A. Yes, sir.

Q. What kind of a light was it? A. A bulb that sits right on the end of the tank, the top end of the tank.

Q. What size bulb? A. That I couldn't say. I don't know what watt bulb it is.

Q. Does it throw any beams down the track at all? A. No, sir.

Q. Would that bulb that was on the rear of that locomotive enable a person in the cab of the locomotive to see in a clear atmosphere a dark object as tall as a man of average size standing erect at a distance of at least 300 feet ahead and in front of it? A. No, sir.

Q. Mr. Wright, how long had you been working on train 209? A. That is not assigned regular to any of us. We catch it. We work first in and first out and catch it occasionally.

Q. Had you been catching it in your regular turn ever since you were employed by the company? A. Yes, sir. I have been catching it off and on but I had been cut off a lot. I was working extra most of the time. The year prior to this was when I was cut off probably seven months.

Q. How many times would you say that you had handled that particular movement as fireman prior to this accident? A. Since I have been employed?

Q. Yes. A. Twelve or fifteen times.

Q. Will you state what was the usual movement of the train during those times? A. Well, the trains that I have went in there and got, we got in the clear south of Clopton Road. I had got in the clear south of Clopton Road for the other trains when I would pick up in there.

Q. Had you ever, prior to this time, when working on this movement, backed into slow siding? A. No, sir, I hadn't.

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CROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Wright, as the road engine backed up north into slow siding, you were sitting on the east side? A. Yes, sir.

Q. And were you facing north? A. Yes, sir.

Q. You were looking up the area between your cars on slow siding and these cars that had stopped on southbound main line, were you? A. Yes, sir.

Q. Does your cab extend far enough out for you to see three car lengths up that area? A. I don't quite get your question.

Q. When you were sitting there in your fireman's seat looking north, could you see three car lengths up that area between slow siding and southbound main line? Let me show you on the plat. You were backing north on slow siding? A. Yes, sir.

Q. Cars were standing here on southbound main line blocking the Clopton Road? A. Yes, sir.

Q. That left an alleyway between the cars you were pushing and the cars standing on southbound main line. Could you see all the way up that alleyway to the head end of your cars and beyond? A. Yes, sir, if there was a light up there I could have seen it.

Q. In other words, the cars you were pushing didn't block your vision? A. No, sir, didn't block my vision.

Q. Did you see any light up there around Clopton Road or immediately north of it? A. No, sir.

Q. Did you see any beam of a flashlight shining across there? A. No, sir.

Q. You had been at the time of this accident in Clopton Yards, you say, about twelve or fifteen times? A. Yes, sir.

Q. And in that twelve or fifteen times that you had been there the road engine, to which you were assigned, had taken a number of different movements, had it not? A. Yes, sir. Sometimes we would go just south of the crossover to the northbound track and then we would go down to the south end of the yard to get in the clear.

Q. So far as you know, in making up freight trains in Clopton Yard, is there any regular routine followed night after night? A. Not as I know of, no, sir.

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Q. Up there at Clopton Yard does the yard crew, night after night, make the same movements? A. No, sir.

Q. Does the road crew night after night make the same movements? A. No, sir.

Q. As you backed up slow siding was the automatic bell on your engine ringing? A. Yes, sir.

Q. You pulled down off the hill and backed into slow siding. May I ask whether that movement of the road engine was a movement in road service or was it a movement in yard service? A. It was a movement in road service.

Q. It was a movement made in a yard but in road service, was it? A. Yes, sir.

Q. Have you worked both in lighted and unlighted yards, Mr. Wright? A. Yes, sir.

Q. Will you state to the jury, according to and from the experience you have had in working in each kind of yard, which type of yard you find is the more satisfactory in which to do your work and which type of yard do you find to be the safer type to work in? A. Well, the yards that are lit that I have been in would blind you at certain places in the yard you get to and you would have to pull your cap down over your eyes to see.

Q. Can you state to the jury from your experience which type you think is the easier to work in? If you can't, don't hesitate to say so. A. You make the same moves in either yard, the ones that I have been in and with the floodlights up there you would get in the right place at times and the things would shine in your face and blind you and you would have to pull down your cap so you would have some shade in your eyes.

Q. Do you operate at night on hand signals from trainmen? A. Yes, sir.

Q. You have to read the signals as given on your side, do you not? A. That is true.

Q. Do you find that the hand signals given by trainmen are more easily deciphered in a lighted yard or unlighted yard? A. In an unlighted yard you could see them better.

REDIRECT EXAMINATION

By MR. GARY:

Q. Mr. Wright, do you think that if that yard had been lighted that night you could have seen Mr. Tiller any more

easily? A. That I don't know. I couldn't answer it because I don't know where Mr. Tiller was. I don't know how he come up. He may have come from the other side or may have come from our side.

Q. You say you could have seen him if he had been in there with a flashlight? A. Yes, I could have seen the light if the beam was in between those cars.

Q. You could have seen Mr. Tiller if Mr. Tiller had been just beyond that crossing examining those cars? A. If he had been in between them, yes, sir, I could have seen him.

Q. Do you think that you could have seen him more easily if the yard had been lighted or as it was without any lights? A. Well, I couldn't possibly have seen him, as dark as it was without any lights, not unless he had one.

Q. When you pull your cap down, as you say you sometimes have to do in a lighted yard, to keep the glare out, if you should happen to get in the way of one of those beams, you can see pretty well in the yard from the lights that are provided; isn't that true? A. It is true if the lights are focused right as they should be in the yard.

Q. If they are focused right they don't usually get in your eyes, do they? A. Well, like at the Norfolk & Western down there, the yard that I have to go in that is lit. The transfer that we have got, pushing around cars in there, has got a crook in it, go around the bend, and those lights make a shadow over the cars and between the cars they make a shadow.

Q. But for the most part in the greater part of the yard you can see much better than if the yards are dark? A. That is true and in some portions it helps and some portions it does harm.

Q. In response to a question of Mr. Denny you stated that this road engine made various movements in the yard. Were all of those movements of the road engine that you had been on prior to the death of Mr. Tiller south of Clopton Road? A. That is true.

Q. And I believe you stated this was the only time up until that time on which you had been on the train that it

had ever backed north of Clopton Road into slow siding?

A. Yes, sir.

RECROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Wright, had Mr. Tiller been standing between slow siding and the southbound main line or on slow siding flashing a flashlight up against the cars standing on southbound main line, would you have been able to have seen the beam of his light better in a dark yard or in a lighted yard?

A. You would have seen it better in a dark yard.

C. L. PARRISH, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. How long have you been employed by the Atlantic Coast Line? A. Twenty-nine years.

Q. In what capacity? A. Conductor.

Q. All the time conductor? A. No, sir, just twenty-three as conductor.

Q. Six years as what? A. Trainman—brakeman.

Q. During this period of service with the Atlantic Coast Line, will you state to the jury whether or not you have had any experience at Clopton Yard in connection with the making up of Train 209? A. I have.

Q. As trainman? A. As trainman and conductor.

Q. How often would you say, in the twenty-nine years that have passed that you have had connection with the classification and making up of this train in Clopton Yard?

A. Two or three times a month.

Q. Two or three times each month? A. That is an average.

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Q. Is there a usual movement made by the road engine as

it comes over with a string of cars to Clopton Yard while it is waiting for the train to be made up by the switching engine from Byrd Street Station? A. Yes, sir.

Q. What is that usual routine movement? A. Well, when we arrive we call the Yardmaster at South Richmond and he instructs us what to do. As a usual thing he tells us to cut off the engine and whatever cars that are necessary and drop in some track. When I say "drop in", we mean go in some track.

Q. What do you do when you drop into that track with the road engine? A. Stay there until the yard engine classifies the train.

Q. Will you state to the jury, Mr. Parrish, whether in all your twenty-nine years experience, including your experience of, I think you said, two or three times a month— A. That is an average.

Q. —connected with 209, have you ever known that road engine to be ordered back in a movement backward with the engine and some cars on slow siding? A. I never have been in there that I can recall. Of course, I don't keep a check on my trips but, as far as I recall, I haven't been in.

CROSS EXAMINATION

By MR. DENNY:

Q. Mr. Parrish, have you ever taken on water over there at Clopton Yard? A. I have not.

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Q. You are not able to state whether you have or have not been in slow siding? A. That is what I said, yes, sir.

Q. Night after night as you have been in Clopton Yard with 209, has the road engine made the same moves or would it makes moves one night using one track and another night using another track? A. We would go in different tracks. That is right.

Q. Is that true of the yard engine also? Does it one night make one series of movements and another night another

series of movements? A. The yard engine making up the train shifting—I don't pay any particular attention to his movements.

Q. This movement of a road engine going down the hill and backing up into slow siding so as to get in the clear in order to permit the yard engine to make up the train is a road movement or a yard movement that the road engine makes? Is it a movement in road service or a movement in yard service? A. Well, you are in the yard limits.

Q. But is it a movement made in road service or is it a movement made in yard service? A. I would say it is a movement made in road service, backing in there.

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Q. Mr. Parrish, have you worked both in lighted and unlighted yards? A. Yes, sir, that is right. I have never worked in yard service but I have been in both yards.

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Q. According to your experience, do you find it easier to do the work in a lighted yard or in an unlighted yard? A. In a lighted yard.

Q. Why do you say that? A. Because you can see any object that is in your way or coupling to cars. It is much better to work in a lighted yard than it would be an unlighted yard.

Q. You prefer the lighted yard? A. Yes, sir.

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JAMES W. SINTON, JR., a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

Q. Mr. Sinton, will you give your full name and your occupation to the jury, please? A. James W. Sinton, Jr.; I am Vice-President of the Atlantic Life Insurance Company.

Q. Are you an actuary, Mr. Sinton? A. Yes, sir.

Q. How many years experience have you had as an actuary? A. Since July, 1913, with the exception of two years I was in the Army.

Q. What is the life expectancy under the American Experience Table on March 22, 1940, of a man who was born on the 13th day of July, 1888? A. That man would be 51 years and a little over eight months old. The expectancy by the American Experience Table would be $19\frac{3}{4}$ years.

Q. What is the life expectancy under the United States Table for white males on March 22, 1940, for a man who was born on July 13, 1888? A. The expectancy of such a man would be exactly half a year less, $19\frac{1}{4}$ years.

Q. Mr. Sinton, what is the present value at 3 per cent of \$150.00 per month for 19.73 years under the American Experience Table? A. If the first payment is to be made at the end of the month, the value will be \$26,895. I have that figure at the beginning of the month, if you wish it.

Q. At the beginning of the month would be what? A. \$26,962.

Q. What is the present value at 3 per cent of \$150 per month for 19.25 years under the United States life table for white males? A. That value, if the first payment is to be made at the end of the month, is \$26,390 and if the first payment is to be made immediately, it is \$26,455.

Q. If a person received additional compensation in the form of a raise, that is above \$150, or earned more than that sum, would or would not these figures increase? A. They would increase, of course.

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REDIRECT EXAMINATION

By MR. SATTERFIELD:

Q. Are these tables to which you have referred tables used by insurance companies? A. The American Experience Table is used by insurance companies based on insured

lives. The white male table of the United States Life Tables is based on general population statistics and not on insured lives altogether.

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E. B. OREBAUGH, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

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Q. Are you an employee of the Atlantic Coast Line Railroad Company? A. Yes, sir.

Q. In what capacity? A. Extra conductor.

Q. How long have you been in the employ of the Coast Line. A. Since October, 1936.

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Q. From the time that you were employed in October, 1936, until March, 1940, will you state to the jury whether or not you were called for service with either First or Second 209? A. Yes, sir.

Q. Were you called for service on both trains? A. Yes, sir.

Q. In yard service as well as road service? A. Yes, sir, just road service.

Q. You had nothing to do with the crew on the yard engine that would bring a part of that train from Byrd Street Station? A. No, sir.

Q. Do I understand you to say that your connection was altogether with the road engine out of Acca? A. Yes, sir.

Q. How many times would you say, from October, 1936, until March 20, 1940, per month you were called for duty with 209? A. I would say anywhere from four to five or six times maybe.

Q. A month? A. Yes, sir, more or less.

Q. During that period, 1936 to 1940, were you then serv-

ing as trainman? A. I was promoted to conductor in 1941.

Q. That was after 1940? A. Yes.

Q. 1936 to 1940 you were in what capacity? A. I was trainman.

Q. Will you state to the jury what was the movement of the road engine when it reached the top of the hill over there near Clopton Yard with a string of cars it was bringing from Acca?

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A. You usually have short hauls to Petersburg and Weldon and, of course, you have to hold your Weldon—it all depends on the classification but you have to get in the clear. My experience every time I have been there—I always drop clear of the crossover on No. 1 track. That would be south of the crossover.

Q. Was that your experience on all of the runs you had on that assignment? A. Yes, sir. I have backed north of the crossover but I couldn't say whether it was on this special train or not.

Q. Do you recall in all of your experience the road engine being pushed back in a back-up movement down on slow siding? A. No, sir, I can't say that I have.

CROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Orebaugh, I understand you to say you have backed north of the crossover? What do you mean by that?

A. To get in the clear. You see they run a transfer from the yard to Acca and sometimes that transfer will be setting in the track there and to keep from blocking him you will drop north of the crossover to let him go over the hill to keep from delaying him.

Q. When you say you drop north of the crossover it means you would back into slow siding, does it? A. Yes.

Q. So you have backed into slow siding? A. Yes, but I

can't say whether it was this train or not but I have been in slow siding.

Q. You don't know whether it was this train or in connection with other trains? A. Yes. I will say a third or a fourth of our trains go through Clopton.

Q. And from time to time you have seen virtually every track in Clopton used, haven't you? A. Oh, yes.

Q. And you have seen them used in forward movements and in backing movements, haven't you? A. Yes, sir.

Q. There is nothing particularly unusual about using any track, is there? A. No, sir, no yard track. You use them any time you want.

Q. Members of train crews know that those yard tracks are likely to be used at any time by a train going forward or backward, don't they? A. Yes.

Q. Have you worked both in lighted and unlighted yards? A. Yes, sir.

Q. From your experience do you find that a lighted yard or an unlighted yard makes your work easier to be done or safer to be done? A. I have worked in several different type lighted yards.

Q. You have worked in Acca? A. Yes, sir.

Q. Which is a right fully lighted yard, I believe? A. Yes, sir.

Q. Do you find that it is easier to do your work and do you think safer to do your work in a yard fully lighted, as is Acca, or in an unlighted yard? A. Well, personally myself I don't like the lights at Acca. They will blind you. I don't like the lights at Acca because the lights are shining down on you, right in your face. You take the yard at Bellwood—I like to work down there in those lights. They come straight down.

Q. Is there a point in the yards at Bellwood that you will get blinded by those lights, the lights being focused in some direction and if you get in the focus of the lights do they blind you? A. I have never noticed it but those lights are mostly coming straight down at Bellwood.

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. If the lights are properly installed by the companies, you prefer a lighted yard or dark yard? A. If I were a yardman I would prefer a lighted yard.

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W. C. MOORE, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. GARY:

* * * * *

A. Willis C. Moore.

Q. What is your occupation, Mr. Moore? A. Locomotive engineer, Atlantic Coast Line Railroad.

Q. How long have you been employed by the Atlantic Coast Line Railroad? A. Thirty-two years and seven months.

Q. How long have you been an engineer with the company? A. Twenty-six years.

Q. Is it a part of your duty as engineer to carry trains into and through Clopton Yard? A. Yes, sir.

Q. Have you during that time made the run known as 209? A. Yes, sir, in my regular run.

Q. Do the engineers take that run in regular turn? A. Yes, sir, we rotate and, if we catch that train, we do.

Q. Prior to March 20, 1940, how often would you say that you were on the run known as 209? A. It is rather hard to say. I run it every other day for a period of time, for days, and possibly a month without it.

Q. But on the average could you give any estimate at all of how many times a month? A. Three to seven times a month or something like that. I think that would be a fair average.

Q. Did you run the road engine or yard engine? A. I have run both.

Q. Will you state to the jury what is the regular movement of the road engine on 209 from the time it leaves Acca?

A. We get cars that are to go and sometimes only the caboose leaving Acca to go to Meadow through the old line to Clopton and there the conductor calls for instructions from the Yardmaster which we obey.

Q. What are those instructions usually? A. As a general rule it is to detach the engine from the train and what cars may be necessary, according to classification, and to get out of the way of the yard engine for him to do the switching.

Q. How does it usually get out of the way of the yard engine? A. Well, as a general rule go into No. 1 track.

Q. No. 1 track? A. Yes, sir.

Q. Is that north or south of Clopton Road? A. South.

Q. Is it north or south of the crossover from No. 1 to the main line? A. The entrance of it is north.

Q. But where you get out of the clear, do you go north or south of that crossover? A. South.

Q. You go on down into the yard south of that crossover? A. Yes, sir.

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Q. Were you ever on 209 prior to March 20, 1940, when the road engine cut off on the hill and, in order to get into the clear backed up in a reverse movement into slow siding over Clopton Road northward? A. I can't remember making that move on that particular train, no, sir.

CROSS EXAMINATION

By MR. DENNY:

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Q. Let us develop it this way: In getting in the clear there do you, night after night, get into the clear in exactly the same fashion? A. No, sir.

Q. Many nights you don't even have to get into the clear because all you have to do is pick up cars down on the south-bound main line? A. That is true.

Q. You simply go on down through the crossover, get those cars, come back and pick up your caboose and go? A. That is true.

Q. And depending on the classifications in your train and the classifications in the yard train are the movements which the Yardmaster directs, are they not? A. The classifications that you speak of in switching?

Q. And some nights the yard engine has to do one type of switching and other nights another? A. That is true.

Q. And some nights you get into the clear and make one set of movements and other nights you get into the clear in another way and make another set of movements, do you not? A. Yes, sir.

Q. And even if you get into the clear by going into No. 1 track, then you come back out of No. 1 track, generally backing into slow siding, don't you, to go over and pick up your cars, or do you run a half mile down to the end of the yard and then back up all the way? A. I can't just understand your question.

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Q. If you get into the clear by coming down off the hill through your hill switch and on down to No. 1 track, you would be right at the very top of this picture and perhaps a little off the picture? A. Yes.

Q. After the yard engine has made up your train, don't you then back up at times on No. 1 track or slow siding and don't you sometimes go all the way down pretty near half a mile to the end of the yard and back? A. We have done that, yes. At times we have picked a train up in the extreme south end of the yard.

Q. When you come into Clopton Yard, either on the yard engine or the road engine, you follow whatever directions the Yardmaster gives you? A. Yes, he gives the instructions to the conductor. I follow his instructions.

Q. The instructions are relayed on to you either by mouth or hand signal? A. That is right.

Q. But they originate with the Yardmaster? A. Yes, sir.

Q. And from time to time in the make-up of these trains almost every track out there is used, is it not? A. Yes, sir.

Q. And is there anything unusual in a freight yard in making up trains about an engine backing on any track? A. I would say no.

Q. The water tank out at Clopton is up north of Clopton Road on slow siding, isn't it? A. Yes, sir.

Q. Don't engines sometimes back up slow siding to get water, or have you seen that? A. I have seen it but in order to do that you have to get particular permission from the Yardmaster.

Q. You have seen engines, either by themselves or pushing cars, backing on slow siding, haven't you? A. Yes, sir.

Q. And you have seen them backing on virtually every track out there, haven't you? A. Yes, sir, they are there for use.

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Q. From your experience as an engineer in working in the manner in which you have worked in lighted and in unlighted yards, will you tell the jury which you consider is the yard better adapted to your work from the point of view of safety and also of efficiency in doing the work? Which type yard, from your experience, do you like best? A. Personally I like a lighted yard best.

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Q. You, I understand, have frequently taken First 209 from Acca to Rocky Mount? A. A number of times.

Q. Is First 209 regularly required to run backward on any portion of that trip? A. Only in a yard movement.

Q. Take the movement which the evidence shows was made on the night in question. First 209 came in and stopped on the hill by the yard office. A. Yes, sir.

Q. It brought with it three high side coal gondola cars, hopper cars, I believe you call them, destined for Petersburg and some cars destined to South Rocky Mount. It held

to the three Petersburg cars, came down off the hill, went through the hill switch, that hill switch was thrown and it backed up into slow siding so as to get into the clear and permit the yard engine to make the necessary classification. Do you follow the move? A. Yes, sir.

Q. Was the movement of the road engine in coming down off the hill and in backing into slow siding a movement in road service or a movement in yard service? A. I would say in road service.

Q. When Mr. Gary was examining you about the use of slow siding, you said you could not remember whether you had ever backed into slow siding to get into the clear or not. Do you mean by that that you simply don't remember or do you mean to say that you have never backed into slow siding? A. I mean to say on this particular train that I don't remember ever having made that move in there to clear for this particular switching.

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REDIRECT EXAMINATION

BY MR. GARY:

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Q. When this road engine came down off the hill, did it require, to get into slow siding, that the switch be thrown? A. Why, certainly, yes, sir.

Q. Did you consider that a switching movement when it backed up on slow siding? A. No, sir.

Q. You wouldn't call it that? A. No, sir.

Q. Was it switching onto that track from the other? A. It is making a move from one track to the other but what we term "switching" is moving cars from one track to another or classification of cars.

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Q. We had a lot of talk about the crossover from No. 1 to the southbound main line. Will you look at that map and see

whether that is shown on the map or not? A. A small portion of it right here.

Q. But the crossover is really out beyond this picture?

A. Yes.

Q. Mr. Moore, you state that this is not a switching movement. Why do you say that is not a switching movement? A. Because we were not making any switching. We were not doing any switching. We were merely—I say “we”; I was not on this particular train, but in making that move the road crew is simply getting out of the way of the yard engine to do the switching. You may find a more definite definition of the word “switching.”

Q. What are you basing your definition of “switching” on? A. “Switching” is classifying cars, switching one out from between the other, and so on and so forth. In other words, if there were a number of cars there and we got a portion of them and we didn’t get them all and we had to switch them out.

Q. What would be the purpose of this engine cutting off these three cars on the hill? A. Because that would put them in proper classification of the train when it left.

Q. Was that necessary, to hold them, in order to make the classification? A. I presume it was. I don’t know of this particular move.

Q. Then if he cut off three cars on the hill and brought them down for the purpose of making a classification, was he doing the same thing that the yard engine would do if it cut off and carried a few cars down to back into a track? A. Did he leave them there or bring them out with him?

Q. Did he leave them there? A. When he backed into clear, did he leave those cars?

Q. Assume that after some other cars had been put to his train he brought them out and then switched them back to his train. A. I see no difference there whether he had cars or a light engine. He was simply getting out of the way with what was necessary to hold to.

Q. You are basing it on the fact that this was a road engine? A. Yes, sir.

Q. And that you consider shifting the movement by a yard engine? A. Yes, sir.

RECROSS EXAMINATION

BY MR. DENNY:

Q. We are not interested at the moment in the question of whether the engine was yard or road but, in your opinion, does an engine which simply takes with it certain cars, in order to clear the way for another engine to classify the train and then the first engine which had gotten into the clear brings its cars back, engage in shifting work? A. No, sir.

Q. And is not engaged in shifting work whether its primary purpose for being there is road purpose or yard purpose, is it? A. No, sir. It would be impossible for the switch engine to do this switching with the yard engine attached to the train. He has got to get out of the way.

Q. Do you mean the yard engine attached to the train? A. The road engine.

Q. You mean the road engine? A. Yes.

MR. SATTERFIELD: The plaintiff rests.

MR. DENNY: If the Court please, I have been informed by one of plaintiff's witnesses that I asked him on yesterday on cross examination a question which contained an implication that a certain thing was a fact. He says he does not know whether it was a fact and that in his answer he did not call attention to that and he asked me whether he could be given the opportunity to go back on the stand and state clearly what he meant. I told him that I thought it would be proper as part of the plaintiff's evidence for me to recall him to ask that question connected with his testimony of yesterday. He wishes to make a correction.

P. W. WRIGHT was recalled and testified as follows:

BY MR. DENNY:

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Q. I asked you on yesterday whether as you sat there looking north toward Clopton Road as you were backing up, with cars standing on the southbound main line and your cars moving, whether you could see down the alleyway between those cars down beyond Clopton Road? A. Yes, sir.

Q. And you said you could. A. Yes, sir.

Q. Do you recall whether or not the cars on the southbound main line were standing still as implied by my question or whether they were moving? A. I don't know. I don't remember whether they were moving or not.

Q. And you wish the opportunity to return to the stand so as to make it clear to the jury that you did not know whether they were moving or standing still? A. That is true.

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MR. DENNY: If the Court please, we have some motions we desire to make and I think it would be advisable to make them in the absence of the jury.

(The jury retired)

MR. DENNY: We move for a directed verdict upon the following grounds:

First, the plaintiff's evidence shows nothing from which the jury might conclude that the defendant had been guilty of any actionable negligence;

Second, that if perchance there is evidence from which actionable negligence could be concluded, there is no evidence here that would show that negligence to have been the proximate cause of the injuries and death of the deceased;

Third, under the decision of the Supreme Court of the United States in this case, the test is whether the defendant, under the circumstances, acted as a reasonably prudent man, that is a railroad, of necessity would have acted under those circumstances, and there is not a word of evidence

here showing what generally approved railroad practices may be. In other words, as this evidence of the plaintiff stands, the jury out of thin air is to guess at what would be a reasonable proper practice;

Fourth, that this evidence discloses no violation of the Boiler Inspection Act or any of the rules or regulations of the Interstate Commerce Commission promulgated pursuant thereto;

Fifth, even if there had been a violation of the Boiler Inspection Act, there is not a line of evidence from which the jury might conclude that that violation was the proximate cause of the injuries and death.

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THE COURT: The motion is overruled.

MR. DENNY: If the Court please, I wish to reiterate the written motion which we heretofore filed and move that there be stricken from the amended complaint the allegations relating to alleged violation of the Boiler Inspection Act and the rules and regulations promulgated pursuant to the Boiler Inspection Act and I wish to be heard for a few moments on that motion.

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The first ground of my motion is that the Boiler Inspection Act does not apply and that is all I care to say on that.

The second ground of this motion is that even if perchance I should be mistaken, there is no evidence here to show or from which the jury could infer that a failure to have that headlight was the proximate cause of these injuries.

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THE COURT: The motion is overruled.

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W. J. Jones, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. How long have you been in the employ of the Atlantic Coast Line, Mr. Jones? A. Forty-one years.

Q. Will you state what positions you have occupied during that forty-one years. A. Messenger boy, telegraph operator, yard clerk, yard foreman, yardmaster.

Q. How long have you been Yardmaster? A. Off and on for nearly forty years.

Q. Has all of your service been rendered here in Richmond? A. Richmond and vicinity.

Q. For how long a time prior to March 20, 1940, had you continuously been Yardmaster? A. On this particular occasion in that period of time I would guess at five years.

Q. Have your duties repeatedly taken you through the whole series of Richmond yards, Byrd Street, South Richmond, Clopton and Falling Creek? A. Yes, sir.

Q. Are you thoroughly familiar with those yards and the operations of trains in them? A. I think I am.

Q. Were you the Yardmaster at Clopton on the evening of March 20, 1940, when First 209 was made up and when Sergeant J. L. Tiller was fatally injured? A. I was.

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Q. And what did you find when you reported was to be your work that day? A. A survey of general conditions indicated that I was to perform the duties of Yardmaster in controlling the operations within that defined territory between Byrd Street and Falling Creek yards.

Q. Did a yard engine subsequently leave Byrd Street yard for Clopton with local freight cars for Second 209 and with cars for First 209? A. Yes, sir.

Q. Mr. Jones, I hand you what purports to be a copy of a switching list dated March 20, 1940, relating to Train First 209 and I will ask whether this is the consist that shows the cars for First 209 that were carried from Byrd Street to Clopton Yard on the night in question? A. This

is a copy of the switch list, the train list or consist, all meaning the same thing, in my opinion. That is a copy of the list of the train on that date.

Q. Of First 209 cars that went out from Byrd Street? A. Yes, sir.

Q. Does that show all the cars that were carried by that train? Does that show the Second 209 cars that were carried? A. This top list does not.

Q. Does the second list show it? A. The second list does show the cars that were carried for Second 209.

Q. How about the third? A. The third list is a list of cars that were carried for Third 209.

Q. In other words, that night you were having three 209s? A. To my best recollection, there were cars for three trains.

Q. How many local cars for Second and Third 209 did the yard engine take out with it? A. I would have to count them.

Q. Count them, please. A. Fifteen cars other than 209.

Q. Other than the First 209? A. Other than First 209.

Q. In what position in the cut of cars from Byrd Street were those local cars when they were carried out to Clifton? Were they at the front of the train, south end of it or rear of it or in the middle—the locals cars? A. They were on the south end of the train next to the engine that pulled the train.

Q. Will you take this consist, the first sheet, that shows the cars for First 209, and tell the jury the destination of the first car north of these local cars. A. The first car north of the local cars was a tank car destined to Waverly, Virginia.

Q. You take that car to Petersburg and shift it to the Norfolk & Western? A. Yes, sir.

Q. So that Waverly would fall into your Petersburg classification, would it not? A. It would.

Q. Then what was the second car? A. The second car on the list is a car destined to Jacksonville, Florida.

Q. And that would fall into the South Rocky Mount classi-

fication, would it not? A. I should, yes, sir. It would probably be put into South Rocky Mount classification.

Q. And then there are six cars consigned either to Petersburg or to points which could be reached only by switch-off at Petersburg? A. Yes, sir.

Q. Then there are thirty cars for South Rocky Mount and beyond; is that correct? A. That is correct, sir.

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Q. I note on this consist of the cars for First 209 that the second line, the car for Jacksonville, which was amid the Petersburg cars, is stricken out and added at the bottom of the page. I believe your testimony is, however, that when these cars came into Clopton Yard that particular Jacksonville car was in between these Petersburg cars? A. That is true.

Q. And on the consist it was stricken out and written in at the bottom? A. That is true.

MR. DENNY: I offer this to be identified as an exhibit.

(This paper is filed and marked Defendant's Exhibit A.)

Q. Mr. Jones, do you know what cars were brought in by the road engine from Acca for First 209 on the night in question? A. There were three cars for Petersburg and the twelve cars for Rocky Mount and beyond.

Q. Did you obtain the consist which has been filed in evidence at the South Richmond yards that night at or about the time the yard engine went over to Clopton? A. I received that list with bills at Richmond, Byrd Street yard.

Q. About what time did you receive that? A. To the best of my recollection, it was at or about 7 o'clock. It might have been a few minutes before or two or three minutes after.

Q. After you received that what did you then do? A. I carried the list with the bills to Clopton and delivered them to the train conductor.

Q. Prior to the time that you arrived at Clopton did you know what cars the road engine would bring from Acca? A. No, sir.

Q. When you arrived at Clopton had the road engine arrived? A. Yes, sir.

Q. Did you ascertain what cars the road engine had? A. Yes, sir.

Q. From whom did you ascertain that? A. The head brakeman on 209 out of Acca. His name was Dickens.

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Q. Had the yard engine reached Clopton when you arrived there? A. No, sir.

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Q. Did you state how you got to Clopton that night? A. I did not but I drove in an automobile to Clopton.

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Q. Where was the road engine when you got to Clopton? A. The road engine was standing on the old northward main line, the branch line, at the road crossing. The front of the engine was about at the road crossing.

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Q. Was it in the position which you gentlemen are accustomed to refer to as being on the hill? A. That is right, yes, sir.

Q. What was the first thing you did after you parked your car and got there? A. Carried the bills to the crossing, to the head end of the train, and I met Brakeman Dickens at the crossing and asked him what he had in his train, meaning "What cars have you and where do they go?" While we were engaged in conversation the conductor of the train from Acca arrived and I delivered him the bills.

Q. Who was that conductor? A. Conductor Wilbourne.

Q. Is he now alive? A. He has since died.

Q. You gave to Mr. Wilbourne the bills? A. I gave him the bills and ascertained from Dickens what his train consisted of.

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Q. After delivering the bills to Mr. Wilbourne and after

he left you, what did you then do? A. I told Brakeman Dickens to hold onto his three Petersburg cars and place the engine and the cars in the slow siding, informing him that I had put a south car in his train.

Q. What do you mean by "put a south car in his train"?

A. Well, I mean that in this case I had a car in 209 from Byrd Street that was to go in the south classification.

Q. Do you refer to that Jacksonville car, which was due to go to the Rocky Mount Classification rather than in the Petersburg classification? A. Yes, sir.

Q. You said you told Mr. Dickens to go into slow siding? A. Yes, sir.

Q. In complying with those instructions what was the proper move for him to make? A. The proper move for Mr. Dickens to make would be to walk down ahead of the engine and put himself in position to throw the switch, to let his train off of the hill track.

Q. Do you mean the first switch on slow siding south of Clopton Road? A. That is the first switch controlling that track.

Q. Will you look at the plat where the old James River line hits slow siding and do you find the switch stand there? A. Yes, sir.

Q. Do you know how far south of slow siding that switch stand is—how far south of Clopton Road, not how far south of slow siding? A. I could not definitely state the number of feet that switch is south of Clopton Road but I think perhaps the switch itself from Clopton Road is close to 200 feet. That is just a guess.

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Q. How many freight cars of ordinary length can you put on slow siding south of Clopton Road without fouling this track going up on the hill? A. One freight car can get in this track, slow siding, and stand clear of the main line.

Q. When you say "main line", you mean the James River line? A. The James River line. It might hold a car and a

third. It wouldn't hold two cars, in my opinion, in there and not foul the James River line.

Q. And what is the length of the ordinary freight car, approximately? A. The average freight car is approximately—the interior of the car is approximately 40 foot 6 inches or 40 feet.

Q. From end of coupler to end of coupler? A. That would run close to 44 feet.

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Q. Do you know whether the cars from Byrd Street had come into the yard at the time the road engine was backing up slow siding? A. They were coming then. The movement of the two trains was simultaneously.

Q. When the yard engine came where were you standing in that yard? A. Near the switch just referred to where Dickens pulled off the hill and backed down into slow siding.

Q. Did you give any instructions to the yard men? A. I informed the yard men that I wanted them to cut this Jacksonville car out of its position that it then occupied and place it on the hill to the cars that had been brought from Acca.

Q. To what yard man did you give that instruction? A. Yard switchman Wamaack.

Q. Where were you and he when you gave that instruction, do you recall? A. Near the position just stated near that switch. I was down a little bit beyond there at the clear, just about clear of this hill track. I had walked forward. This yard engine came down the main line, south on the main line and I had walked diagonally toward that train.

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Q. How far south of Clopton Road was it, approximately, that Mr. Wamaack had to make that cut—how many car lengths? A. I would say three or four car lengths.

Q. Do you recall whether the train from Acca had stopped in order that that cut might be made or whether the cut had been made before Mr. Myrick backed up? A. At the time the cut was made I don't know definitely. I can't say. I am

inclined to believe that Mr. Myrick was moving backward. I know he was moving backward at the time the train arrived from Byrd Street but where Myrick was at the identical moment that Wamack cut that car loose, I am not clear.

Q. In other words, you can't give us any definite testimony on that matter? A. No, sir.

Q. You had instructed the road engine to back the three coal hoppers into slow siding? A. Yes, sir.

Q. And you had instructed that a cut be made immediately behind the Jacksonville car from Byrd Street? A. Yes, sir.

Q. And that the yard engine carry the Jacksonville car and the cars ahead of it down south, then back up onto the old James River division and put the Jacksonville car to the twelve South Rocky Mount cars up on the hill which had been brought from Acca? A. That is the move that had to be made in order to put the Jacksonville car on the hill.

Q. After the yard engine put the Jacksonville car on the hill, what was the next thing the yard engine was to do? A. The yard engine backed down on the southward track, shoved forward again and coupled onto the cars that he had just left on the southward track and left this other Petersburg car.

Q. In other words, he brought the one Petersburg car which was south of the Jacksonville car back to the southbound main line and put it to the other Petersburg cars? A. Yes.

Q. That gave you then on southbound main line, beginning at the south, the yard engine and these fifteen local cars for Second and Third 209, seven Petersburg cars and thirty Rocky Mount cars? A. That is right.

Q. Then what was the yard engine to do? A. Cut behind his cars for Second and Third 209 and go to the south end of the yard and dispose of them there.

Q. In the meanwhile, after the yard engine had put the Jacksonville car up on the hill and had backed down off the hill—right at this point, why do you say “backed”? A. Because the shifting engine was headed north and to get in

that position he had to back. When an engine moves backward it is going—

Q. The yard engine had to back down off the hill and put this one Petersburg car back to the Petersburg cars on southbound main line. What was the road engine to do? A. That completed the train so far as the yard engine's work was concerned. The road engine was to come forward down slow siding, cross through a crossover onto the southward track, back up the southward track and couple onto the cars that had been left there by the yard engine.

Q. Couple his three Petersburg cars right to those seven Petersburg cars from Byrd Street? A. Yes, sir.

Q. Then what was the road engine to do? A. Pull his train down the southward track beyond this crossover so that he could back in and couple to the cars that he had brought from Acca and left standing on the hill track.

Q. That having been done, his train was complete and he was ready to go south, was he not? A. Yes.

Q. When you go to a yard to take charge of the make-up of a train in the classification of cars, what is your first duty in determining the movements you will order? A. I consider the requirements of the duty and the safe handling of the cars to get the train made up with as much dispatch as we can do with safety.

Q. In other words, if I understand your answer, is it expedition with safety? A. Yes, sir.

Q. Do you find that night after night at Clopton and at other places you have to order a different set of moves than those ordered the preceding night? A. Conditions are not at all the same. There is a variation. Quite often we won't make the same move but perhaps once in two or three nights and then again we might make the same move tomorrow night that we made tonight.

Q. Why did you order the road engine on this night in question to get into the clear by backing into slow siding?

A. By doing that he would be in a position to quickly move out of slow siding to the main line and couple onto his train.

Q. Virtually to follow the road engine? A. Follow the yard engine.

Q. You could have ordered him into No. 1 track that night because he ran into it before backing up. A. Yes, he had to go down in that track. The extension of slow siding is No. 1. He had to go down in No. 1 in order to get back into slow siding.

Q. What did you consider to be the advantage in putting the road engine back into slow siding over the situation you would have had if you had directed him to wait down in No. 1? A. If he had waited in No. 1 there would have been a loss of some two or three minutes in his waiting until the yard engine had finished its work on the main line and gotten out of the way. He would have had to back up and pull through the main line, a difference of two or three minutes, perhaps. In the position in which he was, however, he followed—as the yard engine left the main line going south, this road engine came right quickly behind him out through the crossover and backed into his train. It is just a question of saving a few minutes' time in getting the train out.

Q. Of course the road engine, in following quickly behind the yard engine, had to wait until the yard engine had put the one Petersburg car back on southbound main line and then moved on? A. It moved up in position to clear and as soon as the track was clear he came out.

Q. If you had directed the road engine when you got there to pull ahead and remain in No. 1 track until the yard engine had made up the train, would the road engine still have been required to back before it could go over on the southbound main line and get its train? A. The switch is behind the engine and in order to get back on the main line or out on the main line he would have to back up over that switch, pull ahead through the crossover and back up again to couple up his train.

Q. Am I correct that it would also have been possible to send the road engine approximately a half mile down the yard on No. 1 track to a ladder track from which he could

have gotten over to the southbound main line and then have backed up the southbound main line to his train? A. At a considerable loss of time it would have been possible to have done so.

Q. How is that? A. It was possible to have done so but at a considerable loss of time.

Q. In other words, he would have had to wait at the end of the yard until the yard engine had not only made up the train but until the yard engine had gotten all the way down to the end of the yard and then the road engine could have started its back-up movement. A. It would have had to pull out No. 1 to the main line and backed up the main line that distance. It would have approximately meant the movement of the road engine of nearly a mile in order to get the train if he had used that method.

Q. From your experience, how much time would you have lost if you had sent the road engine all the way down to the end of the yard to wait until the yard engine had completed its work and gotten down there and then for the road engine to back back up? How much time would you have lost? A. With that one move I would say close to twenty minutes. It might have been a few minutes more—between twenty and twenty-five minutes, I would say.

Q. Have you frequently been in Clopton Yard, either as foreman or as Yardmaster, at the time of the make-up of this First 209? A. Yes, sir.

Q. Have you frequently been there and supervised the make-up? A. Many times, yes, sir.

Q. Have you ever seen the road engine make the same movement that it made on this occasion? A. Time and again, sir.

Q. Had you ever prior to March 20, 1940, as Yardmaster, directed that move? A. Yes, sir.

Q. Did you know any fact, gleaned from your long experience there, that cautioned you to believe any movement by which the road engine could have been gotten out of the way on that night might be a safer move than the one that

you took? A. I don't know of any safer move I could have made.

Q. There is some hazard connected with every move in a yard, isn't there? A. Absolutely.

Q. Did you see Mr. Tiller on the night in question, prior to the time he was injured? A. No, sir, I did not.

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Q. Did you make any physical investigation there that evening to ascertain whether any wheel had rolled over Mr. Tiller or not, or did you see any fact there which would indicate either that a wheel had run over him or that a wheel had not run over him? A. Indications were that a wheel had run over his leg.

Q. Will you state to the jury how you got Mr. Tiller out? By what means did you get Mr. Tiller back out of the yard?

A. Mr. Tiller was taken on the stretcher and placed in an empty car and taken to Hull Street where he was met by a City ambulance.

Q. Did the yard engine take him on back in the empty car? A. Yes.

Q. Was it a box car? A. Empty box car.

Q. Do you know from what point in the yard that empty box car was gotten? A. It was gotten from the north end of Track No. 2 at Clopton Yards.

Q. That is the track immediately west of slow siding and No. 1? A. Parallel to slow siding, yes.

Q. Could you on the night in question have ordered the road engine to get into the clear by the use of Track No. 2 or did this box car which was there block it? A. No. 2 track was full of cars and no room in that track.

Q. Is there anything unusual in classification having to be made in Clopton Yards in connection with 209? A. The completion of the classification of that train is made at Clopton.

Q. Am I to understand from that that it is begun at Byrd Street and completed at Clopton? A. Yes, sir.

Q. Is there anything unusual about a South Rocky Mount car coming out from Byrd Street in between Petersburg cars? A. That does sometimes occur.

Q. And you order each night these respective movements as you may, first of all, feel are safe movements and then those which are the most expeditious? A. Yes.

Q. Is it a fact that at times if you lose two or three or four or five minutes in a freight yard by unnecessary classification movements, you will perhaps delay that freight as much as half an hour or forty-five minutes to an hour in reaching its destination? A. Yes, sir.

Q. Why is that? A. Well, we have to respect the schedule of passenger trains and the movement of freight trains and, for instance, in this particular case 209 left Clopton and went on to the main line at Falling Creek Yard. We then at that time had a passenger train leaving Broad Street, I think, in the neighborhood of 7:35 or 7:45. The running time that the dispatcher allows a freight train of this class to precede this fast passenger train is twenty-five minutes to clear him at Petersburg. If it takes twenty-five minutes for him to do it and this 209 arrived at Falling Creek three or five or four or six minutes off of that twenty-five minutes, he cannot precede that passenger train. If the passenger train for some unforeseen reason is being delayed leaving Broad Street depot, this freight train is delayed in consequence a further length of time. So the loss of three or four minutes off the schedule might result in considerable loss of time in the aggregate.

Q. Mr. Jones, do you know whether hopper cars of the type that First 209 backed into slow siding on this occasion have sides that are so high that if a headlight was on the tender of a locomotive as a rear light, it would clear the top of those hopper cars or would it shine simply against the end of them? A. If the hopper car was empty the light might shine above it.

Q. Have you ever measured to ascertain whether it would or not? A. No, sir.

CROSS EXAMINATION

BY MR. SATTERFIELD:

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Q. Don't you know from your forty years of experience that when a yard engine moves down between an alley of freight cars that the light from its rear headlight is diffused on each side and is reflected on the side of the freight cars? A. That is true.

Q. Is that true in this instance? A. Yes, true in every instance, so far as I know.

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Q. Is it not a fact that it was because you wished to expedite this movement and the further fact that there had been an error of classification made of a Florida car, when those cars were lined up at Byrd Street Station that day, that those two facts called for the maneuvers and the moves that were made both by the yard engine and the road engine that night in Clopton Yard?

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A. Any switching in Clopton Yard, reclassification of the train, necessitates the movement of the road engine out of the way so that this train can be made up.

Q. I didn't ask you that question. A. That was the move we made.

Q. Will you answer the question I asked?

(The question was read)

A. There was nothing about this movement, Mr. Satterfield, to indicate carelessness or extraordinary speed to get this train out any more than we do every night.

Q. I haven't asked you that question. Will you permit me to ask it to you again? A. Go ahead.

Q. I am asking you isn't it a fact that because you, in conformity with your usual practice in trying to speed up and to expedite the handling of traffic in the yard as Yardmaster, plus the additional fact that that day over at Byrd

Street Station somebody had made an error in putting a Florida car in the wrong place in the string of cars that was to come over to Clopton Yard that night, that those two facts were responsible for and called for the moves that you ordered the yard engine to make and the road engine to make in making up 209? A. If it had not been necessary to put this Jacksonville car on this train out of Clopton, that one move would have been dispensed with, would not have been made, but as it is generally understood here and has been repeated over and over, the classification of this train is completed at Clopton Yard and we do it every night at Clopton Yard one way or another. The train isn't complete until it is classified at that point and I don't know of anything particular on this occasion that required extraordinary speed to get the train going any more than we do ordinarily. The speed of the men in this movement was about the same as we always take in making up a train at Clopton.

Q. So I take it you tell the jury that it was the usual speed with which you operate and plus the fact there was a car in wrong classification that occasioned the moves that were made by the two engines that evening in the yard in making up 209; is that correct? A. The movement by putting this car in classification on this train from Acca. That is what you want to know?

Q. No, you had to put it in the train in its proper place from Acca to correct the mistake that had been made over at the Coast Line Byrd Street Station, didn't you? A. Yes. If that car had come out of Byrd Street Station in the south classification we would not have had to make the move at Clopton of that car.

Q. Is it not a fact that it is the business of the yard engine and its crew to make up First 209 in Clopton Yard every night? A. Yes, sir.

Q. To put that Florida car that was incorrectly placed at Byrd Street Station in its proper place, some agency had to make a change in the arrangement of the cars that came

from Acca; isn't that true? A. That arrangement was made by holding on—

Q. Just answer my question and I will permit you to make any answer you wish. Is that right? A. Yes.

Q. What do you want to say? A. I have nothing further to say.

Q. Either the road engine had to move the three Petersburg cars so that the Florida car could be put up on the hill in the proper place or the yard engine had to move them; is that correct? A. That is correct.

Q. So you decided to order the road engine to do it? A. I decided to order the road engine to hold onto the three cars, to avoid further delay that would have accrued had the yard engine made the move with the three coal cars.

Q. Whether you term it "holding onto" or "pushing it" or "carrying it in", you ordered the road engine to take those three Petersburg cars off of that hill down across the hill switch, up into No. 1 track, didn't you? A. Yes, sir.

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Q. When it went down in No. 1 track it had to go all the way down over the crossover, didn't it? A. It had to go down over the switch.

Q. You backed the road engine—no, it carried them down there in a head-on movement, didn't it? A. Yes, sir.

Q. It went down the hill, over the hill switch and down to what they call pass track 1 which is immediately adjacent to the southbound main line; is that right? A. That is right.

Q. When it got down there how far past the crossover did it go? A. The cars?

Q. The three cars and the engine—past the switch? A. Just far enough for the brakeman to throw the switch that it might back up in slow siding.

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Q. Will you show me the hill switch. Show the jury the hill switch. A. The hill switch is the first switch connecting

the hill track with the track you are just discussing, slow siding, on No. 1 track.

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Q. This is the crossover? A. This is the crossover from the southward main line.

Q. It is the only crossover there. A. He did not pass that.

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Q. I want you to tell the jury how far is it from that crossover to the hill switch? Here is the beginning of it right here. That is the hill switch. A. Just a guess but I imagine it is about three car lengths.

Q. How far did you tell the jury on direct testimony a moment ago it was from this hill switch down to this stretch of track on the south side of Clopton Road? A. I told the jury that I did not know definitely but I thought it was about 300 feet.

Q. Didn't you tell them that only a car and a third could be put in there and be in the clear for a movement down this track? A. I did. I told them it would hold about one box car and a third of a box car to clear this crossing and to clear this hill track.

Q. I want you to tell the jury, do you make as a statement of fact, under the experience you have had in that yard as a Yardmaster, that the distance from that crossover to this switch would accommodate an engine and tender and three cars? A. I don't think so.

Q. Do you still say to the jury that is where he stopped, between this crossover and that switch? A. No.

Q. Where did he go? A. He stopped the rear car just as it came off the hill track in order that the brakeman might throw that switch so that he could back his train.

Q. The engine was beyond the crossover? A. The engine—perhaps it might have been even with the crossover in order to get the rear car over this switch so it could be

thrown. It is possible that the engine might have been in the neighborhood of that crossover.

Q. Mr. Jones, you told the jury a moment ago that No. 1 track was open, didn't you? A. Yes, sir.

Q. Why didn't you order him down in No. 1 track if there was a place he could be in the clear there with these three cars instead of sending him with a back-up movement down in slow siding? A. I told the jury I put him in the back-up movement so he might be in a position, when the yard engine had placed the car on the hill, to move immediately forward and when the main line crossover was clear to come right out behind the yard engine.

Q. And I understood you to tell the jury that the purpose of that order was, as you said, to save two or three minutes? A. Perhaps two or three minutes.

Q. Isn't that where it has usually been sent—the road engine—south of the crossover? A. Sometimes we will drop an engine in there if we have got cars up in here. It depends upon circumstances.

Q. But there was plenty of room up there for him on that occasion, on No. 1 track? A. Yes, there was. There was room enough in there to hold the engine and the three cars.

Q. The yard engine took a cut of cars after it had brought that string—how many cars did it bring from Byrd Street Station? A. About forty-five.

Q. He took a cut of cars south of Clopton Road and moved on down the yard with them? A. After he had completed the train, yes, sir.

Q. When he first got there, when finally he stopped, they took some cars away from the front of the train, I believe you told the jury (I don't remember the number) and moved off southward down the southbound rail? A. Yes.

Q. The road engine took a cut of cars, only it took them off of the top of the hill. A. The road engine took three cars off the top of the hill.

Q. I ask you as the yardmaster in charge were not these movements, one made by the road engine and the other by

the yard engine, a part of the moves necessary to make up First 209? A. The movement of the two trains was necessary to complete the movement.

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Q. Was the movement made by the road engine coming down off the hill to get the road engine out of the way? A. Yes.

Q. That was your principal concern as Yardmaster night after night, to get the road engine out of the way so the yard engine could perform its duties, wasn't it? A. Yes, sir.

Q. Will you tell these gentlemen, if that was the case, why did you have him carry three cars with him that night? A. The reason I had him to carry three cars that night was because these three cars were for Petersburg and when the train was completed and he was to pick up, his Petersburgs would be coupled to the seven Petersburgs to put them all in one bunch or classification so that when they were set off at Petersburg no switching would have to be done. All of the Petersburg cars would be together. That is what we call classifying a train.

Q. So that that maneuver or move, I believe it is called, was essential in making up 209 that night? A. Yes, sir.

Q. I believe you told the jury a moment ago that you told Dickens to take those three cars out of there because you were going to follow that with the next move of having the yard engine put the Florida car in the right place? A. Yes, sir.

Q. When you were talking to Dickens he was, as you told the jury, standing down on the Clopton Road in front of the road engine before it came down off the hill; is that correct? A. That is right, yes, sir.

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Q. To get back on this slow siding and conform with your order, it had to go up to the hill switch and come back? A. Yes, sir.

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Q. Where were you standing?

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A. South of the road crossing.

Q. Were you there when Mr. Myrick pulled down? A. No, sir; when I told Dickens what to do, I moved.

Q. Where did you go? A. I walked on down over the crossover but stopped right in here.

Q. Didn't you state to the jury a moment ago that Mr. Dickens walked down to the switch preparatory to throwing it so he could come back? A. He passed me but I don't know how far he went.

Q. So he walked across this road with his lantern, didn't he? A. No, he was on this other side, south side of the road, when I told him what to do. Dickens was standing here when I approached Dickens and told him what to do, south of the road crossing, just south of the road crossing.

Q. Didn't you state to the jury on Direct Examination that you went up to the engine that was standing there and had not yet entered the road or crossed it and that Mr. Dickens was standing there beside the engine? A. No, I didn't say that.

Q. I will ask you did Mr. Dickens have his lantern in his hand? A. Yes, sir, he had something in his hand. I took it to be his lantern.

Q. You took it to be a lantern? A. Yes.

Q. What did it look like? A. I didn't pay any attention to it. I was talking to him and the conductor came up at the same time and I handed him the bills.

Q. It was dark, wasn't it? A. It was dark.

Q. Could you miss seeing a lantern? A. If I had been looking that way, I was looking at the conductor. I presume he had his lantern.

Q. He had gotten across the road and he was on foot? A. He was already across the road.

Q. And on foot? A. Yes.

Q. And he passed you as you went on down toward that

general direction southward? He passed you on the way to the hill switch? A. Yes.

Q. Do you know whether anyone told Sergeant Tiller that night that that move would be made? A. I don't know, sir. I never saw him myself and I didn't hear anyone else say that they had seen him.

Q. You didn't tell anyone to look out for him, did you? A. No, sir.

Q. You knew Sergeant Tiller? A. Quite well.

Q. You have seen him many nights there inspecting the car seals as the train would be moving southward, had you not? A. All over the yard.

Q. You had seen him on some occasions standing there between the tracks and on the slow siding with his flashlight, checking the car seals as the train moved down? A. I don't recall ever having seen him on slow siding but I have seen him all over on both sides of the yard.

Q. What places did you see him? A. I have seen him south of the crossover switch that you were discussing.

Q. Between the rails, with his flashlight? A. Between the tracks.

Q. With his flashlight? A. Yes. I have seen him at the south end of the yard.

Q. With his flashlight? A. With his flashlight. I had seen him at Byrd Street with his flashlight and I had seen him come down from Acca on the train with his flashlight.

Q. You have seen him sometimes north of Clopton Road, haven't you? A. Many times.

Q. There were only two engines in that yard that night? A. Only two engines, to the best of my recollection.

Q. It is a fact that between half past six and half past seven, or whatever the usual hour is that 209 is being made up, there are just the two engines in the yard there at that time? A. Generally there are just two engines, yes.

Q. There were no other cars moving in the yard at that time except those incident to 209? A. Well, sometimes—

Q. I mean that night. A. No, not that night.

BY MR. DENNY:

Q. Mr. Jones, did the road engine on that night do any classifying work? A. No, sir.

BY MR. SATTERFIELD:

Q. Your company has a set of rules for the employees of the company which govern and dispose of the question as to whether or not, when they are ordered to do certain things, it is yard service or road service; isn't that true? A. Yes, sir.

Q. As a matter of fact, under those rules if, as Yard-master, you are injudicious enough to order a road engine to do a little too much, that employee will get road time, if he is going on down to Rocky Mount, plus a whole day for switching? A. Yes, sir.

Q. What is the demarcation that decides the question of how much they are to earn under circumstances of that sort, as to whether it is road or yard service? A. Well, if this road engine had made this move, switched this Jacksonville car onto the train, had performed the duties that the yard engine had performed, then he would have, according to the rules, been entitled to additional pay.

Q. In other words, if they had, besides backing up the three cars—the road engine—had left those three cars there in slow siding and had slipped on up the hill and helped the yard engine in making up the train by putting the Florida car in the right place, they would have gone over the line, so to speak, and would have been entitled to yard service? A. Yes.

REDIRECT EXAMINATION

BY MR. DENNY:

Q. Mr. Jones, in making your moves out there, if the road engine comes in with short hauls for Petersburg and Weldon and also south cars destined for Rocky Mount, doesn't the road engine always have to hold onto its short hauls? A. It

depends entirely, sir, on how the cars are standing. If we are running Petersburgs on the head of the train and we have got Petersburgs in the other cut, the logical thing to do is for him to hold onto those three cars in order to get them all together and avoid any switching.

Q. And for a long time you had been classifying that train Weldon, Petersburg and Rocky Mount, had you not? A. Yes, sir.

BURTON A. ANGLE, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. TOWNSEND:

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Q. What position do you occupy, Mr. Angle? A. Sergeant of Police, Coast Line Railroad.

Q. Did you occupy that position in March of 1940? A. Yes, sir.

Q. You were not present at the time Mr. Tiller was hurt, were you? A. No, sir.

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A. We taken Mr. Tiller out and put him in the ambulance and I got in with one doctor and Mr. Tiller and went to the Memorial Hospital and there we were unable to get a room for him so we put him back in the same ambulance and carried him to Grace Hospital.

Q. Did they take him in at Grace Hospital? A. Yes, they took him in at Grace Hospital.

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Q. Mr. Angle, how was Mr. Tiller dressed on the occasion? A. Mr. Tiller had on an unusual lot of clothes. He was dressed for heavy wintertime, being out all night. As near as I can remember, he had on a sweater, heavy underwear, a leather vest and a top leather coat.

Q. Have you ever ridden train First 209 from Acca to South Rocky Mount? A. Yes, sir.

Q. Have you ever ridden it with Mr. Tiller? A. Yes, sir.

Q. Are any instructions given the special officers of moves that are to be made in the yard? A. No, sir, none at all.

Q. Where do they ride on the train? A. Well, I would say we ride all the way from the engine and sometimes we ride on top of the cars, inside the cars; sometimes we ride the cab.

Q. Are instructions given you as to whether you must look out for yourself in the yard? A. We have always been instructed to look out for ourselves doing general police work outside of the train.

Q. Have you ever ridden First 209 with Sergeant Tiller? A. Yes, sir.

Q. Have you ever been assigned to First 209 when the engine went into slow siding? A. I have at times seen engines go through slow siding. I couldn't say what time it was or what time of year it was or what year it was in.

Q. Would it be an unusual thing if it did back into slow siding? A. I don't think so.

CROSS EXAMINATION

By MR. GARY:

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Q. How many times have you seen the road engine to 209 come down off of the hill onto track No. 1 and back up into slow siding? A. No special move. I never taken notice to any special move being made.

Q. Do you recall ever having seen it make that move in the make-up of 209? A. Well, yes, I have.

Q. How many times? A. I wouldn't say.

Q. Wouldn't you say it was very infrequent? A. Well, I never rode 209 regular, you see.

Q. But usually it goes down into track No. 1 down below the crossover, doesn't it—the road engine? A. The road

engine generally pulls down to the south end of the yard.

Q. Over the crossover? A. Yes.

Q. And it is very infrequent that it backs up into slow siding; isn't that true? A. I haven't seen it go in there so many times but I have seen it used. I am not out there every night.

Q. Were you Sergeant of Police when Mr. Tiller was killed? A. Yes, sir.

Q. And you are still Sergeant of Police? A. Yes, sir.

Q. Have you had a general raise in salary since Mr. Tiller was killed? A. Yes, sir.

MR. DENNY: May it please the Court, I object to that question. It has nothing whatever to do with this case. We are concerned with matters in March, 1940.

THE COURT: I think the objection is good.

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WILLIAM FERGUSON, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. How long have you been on the Atlantic Coast Line police force? A. Something over sixteen years, about sixteen and one half.

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Q. Did you ever, as a sergeant of the railroad, ride First 209 from Richmond to South Rocky Mount regularly? A. Yes, sir.

Q. About when was that that you rode it regularly? A. Five years since I rode it regularly.

Q. Was that before Sergeant J. L. Tiller began to take on that as a regular run? A. He and I rode it together, that is about every other night.

Q. You alternated; you would take it one night and Mr. Tiller the next? A. Right much of the time, yes, sir.

Q. When you were riding that train where did you generally meet it? A. Part of the time at Clopton Yard—not much of the time. The bigger part of the time I would ride the cars away from Byrd Street Yard.

Q. Would you sometimes ride them from Acca? A. Yes, sir, more especially on Sundays.

Q. Did you have any instructions governing the point that you should occupy on the train when you were riding it? A. No, sir. We used our own judgment and ride about where we want to.

Q. Where do you ride on the trains? A. The majority of the time on the caboose.

Q. Where else do you ride? A. I have rode in an empty car and I have rode on the engine.

Q. Do you gentleman also, in between connecting yards and for short distances, ride the top of the cars? A. I have done that at times, yes, sir.

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Q. What tracks in Clopton Yards are used in the make-up of First 209, or do you know? A. I know some of them that was used at the time I was riding was used pretty often, if not regularly.

Q. What tracks were those? A. Well, the yard engine brings cars out from Byrd Street Yard and he would be on one or the other of the main lines. We have a northbound and southbound. Most of the time it would be on the regular southbound track out to Clopton Yard and the road crew that came out of Acca to pick up these cars at Clopton would come in over what they call the old Belt Line and the engine would stop just about opposite Clopton Yard office. As a general rule, the engine would cut off and pull down and get in a track out of the way if she had some switching to do on the train of cars that were brought on that train or the cars that were brought out from Byrd Street.

Q. Have you seen the road engine get into the clear by going down into No. 1 track? A. Yes, sir, No. 1 and the

southbound main line. Of course, he would have to pull down quite a ways to get in the clear.

Q. Have you seen him go into the clear by the use of No. 2 track? A. I don't recall whether I have or not.

Q. Have you seen him go into the clear by backing into slow siding? A. Yes, sir.

Q. Are you advised, when you are in a yard, of the various moves that are going to be made? A. Hardly ever, no, sir.

Q. What instructions do you receive concerning moves in a freight yard? A. Never no special instructions. We use our best judgment in protecting the property.

Q. Is there anyone, so far as you know, who watches out for you there or are you to watch out for yourself? A. As a general rule I always look out for myself.

Q. Do you gentlemen follow any regular routine in doing your work or do you mix up the manner in which you do your work? A. Well, we wouldn't do it the same way all the time, especially when men are a little scarce. We go about it a little different, that is to keep any outsider from knowing our routine.

Q. Are the seals of First 209 cars out of Byrd Street ever checked by the special policeman in Byrd Street Yard?

A. Yes, sir. A lot of times when I was riding I would check at least one side of it before it got away.

Q. Do you know whether Sergeant Tiller ever checked seals in Byrd Street Yard? A. Yes, I have checked seals with him down there.

Q. At times you would also check them at Clopton Yard? A. Yes, sir.

Q. At times you would check them further down? A. We would try to check them further down if we had time, try to get up to as much as halfway of the train anyway.

CROSS EXAMINATION

By MR. SATTERFIELD:

Q. As a matter of fact, thievery on the Atlantic Coast Line Railroad by ingenious people who would even let rope

ladders down off the cars, kept you two boys pretty busy, didn't it? A. Well, that was our main reason for riding, to keep the cars from being broken into.

.

Q. You said a moment ago that the times that you had been over there and would see what was happening when they were making up 209, as a general rule the engine would cut off, the road engine and drop down into the yard to get into the clear; is that correct? A. Yes, sir, most of the time.

Q. Any other movement on the part of that road engine to get into the clear was unusual, wasn't it? I mean by that it didn't happen often. A. Well, I don't know. They didn't have any set place to get in the clear. They had several tracks that they could get into the clear.

.

Q. I want you to look at these gentlemen and tell them isn't it a fact that usually or generally, as you express it, the general rule was that the locomotive, the road engine that came over from Acca, went down over the crossover, and usually rested, waiting for the yard engine to make up the train in one of those pass-by tracks or, in some instances, on the southbound main line?

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A. Most of the time they did go down either to No. 1 track or the southbound main line. Occasionally they would back in on what is known as the slow siding, I believe.

Q. Occasionally? How many times did you ever see it do it actually, yourself? A. I don't remember any actual count but I have seen them do it a few times.

Q. Three or four times? A. I would say three or four times, yes, sir.

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MR. DENNY: We offer in evidence, if the Court please, the following stipulation entered into between the parties:

"The parties agree that if officials of the five railroads

operating in and out of Richmond, who are familiar with the practices on their roads and generally prevailing throughout the southeast were present, they would say:

"1. Most, if not all the railroads have lighted, by overhead lights some of their largest yards. Also in many smaller yards wherein a repair shop or a warehouse may be located, such outside lights as may be necessary for the purposes of the shop or warehouse have been installed, and from these lights the tracks in the immediate vicinity of the shop or warehouse receive some light. Some yards adjacent to street lights installed by a city, town or county receive some light therefrom. So far as is known to these witnesses, no yard of the size and character of Clopton Yard has been lighted by a railroad. The Chesapeake and Ohio Railroad Company has lighted such large yards as Newport News, Virginia, its Fulton Yard in Richmond, Virginia, its yard at Clifton Forge, Virginia, where its main line and its James River Division unite, and its Russell yard in Kentucky, which is the largest yard on that entire system. The Atlantic Coast Line Railroad Company has lighted its South Rocky Mount yard in North Carolina, it has lighted that portion of its Florence, South Carolina yard which surrounds the passenger station, and it has partly lighted its yard at Waycross, Georgia. These are the three largest yards on its system of road and are its main classification points. With the exception of its Fulton Yard, the Chesapeake and Ohio has not lighted its other yards in Richmond, wherein from time to time during the night some movements will take place, but in which movements are not continuous, or virtually continuous. The Southern Railroad has not lighted its yard in Richmond. The Acca Yard of the Richmond, Fredericksburg & Potomac, which is a primary interchange and classification point and is vere active day and night, is lighted. The Seaboard Air Line has three yards in Richmond, no one of which has it lighted. The South Richmond and Byrd Street yards of the Atlantic Coast Line have not been lighted by it.

"2. The railroads make it a practice, both in their large most active yards and in their smaller less active yards, not only to pull cars with the locomotive being in the lead position, but also to push cars with the locomotive in the rear position of the movement. When cars are thus pushed, it is not the practice of the railroads to place on the lead end of the movement a headlight similar to that carried by a locomotive, or otherwise to light the lead end of the back-up movement. Sometimes for some special purpose a man carrying a lantern may ride on the lead end of the movement. They are not only accustomed to push cars with the engine running forward, but also to push cars with the engine running in reverse.

"3. Road engines, equipped for road service, but not equipped with headlights for yard service, which bring cars into a yard, make such movement as may be necessary or convenient, to get the road engine alone, or the road engine and cars adjacent thereto, out of the way so that the yard engine may do the necessary classifying and switching work."

(The stipulation was filed and marked Defendant's Exhibit B.)

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N. F. ENGLISH, called as a witness by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. How long have you been one of the A. C. L. police sergeants? A. Right close to twenty years.

Q. Have you ever ridden train 209 from Acca to Rocky Mount? A. Yes, sir.

Q. Did you ever ride that train regularly? A. Yes, sir. I was assigned to that train regularly around 1934, I believe.

Q. Was Mr. Tiller also riding that train at that time? A. Yes, sir, part of the time.

Q. You rode it alternately? A. Yes, sir.

Q. After you were assigned to other runs did you, from time to time, take this run on First 209? A. Yes, sir, quite often I was coming into Richmond and would ride 209 back.

Q. Have you frequently been in Clopton Yards? A. Yes, sir.

Q. Have you frequently been in Clopton Yards when train 209 was being made up there? A. Yes, sir.

Q. Have you ever seen the road engine back cars up into slow siding so as to get in the clear to enable the yard engine to make up the train? A. Yes, sir.

Q. Have you seen the road engine get into the clear in other ways? A. Yes, sir, I have seen it do both ways.

Q. What other ways have you seen it get into the clear? A. I have seen it get in the clear on some other tracks beside that one.

Q. What other tracks? A. Other tracks in the yard. I am not familiar with the different names of the tracks.

.

Q. When you go into a yard in connection with your police duties, does anyone advise you what moves are going to be made by the engines in that yard? A. No, sir.

Q. What instructions do you receive? A. We don't receive any instructions at all.

Q. Is there any official or employee connected with the various crews whose duty it is to watch out for you special policemen? A. No, sir, we have to look out for ourselves.

Q. Do you follow, in doing your work, a regular routine, that is, do you do the various things you have to do in the same order and from the same places day after day and night after night? A. No, sir.

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CROSS EXAMINATION

BY MR. SATTERFIELD:

Q. Mr. English, are you a native of Richmond? A. No, sir, Rocky Mount.

Q. When did you come to Richmond to work with the Coast Line? A. I never worked—I never have been assigned to Richmond. I have rode trains from Rocky Mount back and forward between Rocky Mount and Richmond.

Q. Your assignment has been in Rocky Mount, has it? A. That is my headquarters, yes, sir.

Q. And you operate out of Rocky Mount? Do you operate out of Rocky Mount to the south? A. Yes, sir, we go as far as Florence.

.

Q. You said something a moment ago when you were testifying about 1934. A. I haven't rode 209 regular since 1934.

Q. You have not ridden it regularly since 1934? A. Not regular. I have rode it occasionally but not regular since 1934.

Q. When you say "occasionally", would you say three or four times a year? A. I would say three or four times or half a dozen times probably a year.

Q. Since 1934? A. Yes.

Q. So in the six years following 1934 you were in there five or six times a year? A. Something like that. I wouldn't say positively.

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J. M. PARRISH, called as a witness by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. What is your occupation? A. Passenger car distributor for the northern division, Atlantic Coast Line.

Q. How long have you occupied that position? A. Approximately six years or thereabouts.

Q. Is that one of the positions under the Superintendent of Transportation, northern division? A. That is right.

Q. I believe in 1940 Mr. J. A. Wall was Superintendent of Transportation? A. That is right.

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Q. State to the jury what were your duties in the month of March, 1940? A. They were the distribution of passenger equipment between various points on the northern division at places that needed certain class of passenger equipment and, in addition thereto, at that time I was making the monthly reports covering reportable injuries and accidents to the Interstate Commerce Commission and also to the Virginia Corporation Commission.

Q. When you prepared reports covering these reportable accidents, what did you do with the report after you had prepared it? A. It was prepared and placed on Mr. Wall's desk. He was Superintendent of Transportation—for his signature.

Q. I show you a certified copy of the report of an accident to Sergeant J. L. Tiller, accident occurring March 20, 1940, the report being made to the State Corporation Commission in April, 1940, and ask whether, in keeping with your duties, you prepared that report for Mr. Wall's signature? A. I did.

Q. In preparing that report did you have any personal knowledge of the matters related to? A. Absolutely not.

Q. From what source did you get information of this accident from which you prepared the report? A. There is a telegraphic report that is made covering all accidents. In this particular case the first information to reach the office was that telegraphic report which is filled in on a printed form.

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Q. Is the telegraphic report to which you refer this report on Form 18? A. Yes, that is right.

MR. DENNY: I offer in evidence, if the Court please, the telegraphic report referred to as Defendant's Exhibit C.

THE COURT: Is there any objection?

MR. SATTERFIELD: No, sir.

(This paper was filed and marked Defendant's Exhibit C and the following is a copy thereof :

ATLANTIC COAST LINE RAILROAD COMPANY

Telegraphic Report of Accident

46 55 X B

Rocky Mount NC March 20 21 1940 Station ———, 19—

To OHP JAW JET

Train Number	A	First 209	Kind of Train	F frt
Engine Number	B	1635	Place of Accident	
			G	Clopton Yard Va
Name of		Date	H	March 20th 1940
Conductor	C	R. W. Wilbourne		
Name of		Hour	J	715 pm
Engineer	D	W. M. Myrick		

1. Kind of Accident? Personal injury to J. L. Tiller between Clopton Yard office and road crossing south of yard office.
2. Is main line obstructed, and to what extent? No.
3. Can trains pass obstruction by running through pass or side track? Blank.
4. Cause of accident? Backed over J. L. Tiller.
5. Is cut, on embankment or on level ground, curve or straight track? Level and straight.
6. Speed of train at time of accident? about 6 miles per hour.
7. Who injured, and to what extent? J L Tiller, Company Policeman of 2904 Montross Ave Richmond Va left leg above knee crushed and left arm at elbow crushed was taken to Grace Hospital Richmond and hospital advise expect have amputate left leg and left arm and do not think Mr Tiller will live.
8. Is engine or tender off track, and in what position? blank
9. How many loaded cars off track?

11. How many empty cars off track?
12. How many cars behind obstruction?
13. How many cars ahead of obstruction?
14. How much track damage?
15. What material needed?
16. What force will be required to clear main line?
17. What time will be required to clear main line?
18. How many car trucks needed?
19. Remarks: Extra 1635, 15 cars stopped on hill at Clopton cut off three head cars in train and backed into slow siding at Clopton for Richmond yard engine to set south rocky mount cars to train on hill and extra 1635 was then to couple richmond package conn pick up to what he had out of Acca apparently Mr. Tiller standing on slow siding watching 62 cars being handled by yard engine passing on main line was backed over by INT Car 5168 being handled by engine 1635 backing into slow siding no witnesses to accident Dr Phillip Jones was called to attend Mr Tiller no apparent defect in Int 5168 but have car at Petersburg for day light inspection tomorrow

R G Murchison
1055am)

BY MR. DENNY:

Q. In addition to this report of Mr. Murchison which is dated March 20-21, what else did you have in your file at the time you prepared the report? A. I had a copy of a letter briefly outlining what had taken place which was signed by Superintendent Murchison and also Form 169-A, which is signed by the crew of Engine 1635.

MR. DENNY: I offer, first, as Defendant's Exhibit D the letter referred to by the witness dated April 4, 1940.

(This letter was filed and marked Defendant's Exhibit D and the following is a copy thereof:

Rocky Mount, N. C., April 4, 1940.
AX-17085

Mr. J. A. WALL,

Herewith file in re fatal injury Sergeant J. L. Tiller, Clopton Yard, March 20, at about 7:15 p. m.

Full reports from the Trainmaster and Captain of Police contain all the facts. The usual custom was for Mr. Tiller to ride cars from the Richmond Yard to Clopton and then continue south on train 209. The moves of the yard engine and road engine are explained. The inference is that Mr. Tiller stepped down from the cars being handled by the yard engine into path of road engine shoving into the slow siding.

Fireman P. W. Wright saw a lighted flash light lying between the slow siding and the southward main line. He mentioned this to his engineer. Investigation was made and Mr. Tiller's cap was found about forty feet north of the road crossing. He was found lying with his back to the outside rail on end of ties. Indications on the ends of the ties suggest that he was struck while standing on the north side of the crossing and dragged under arch bar of INT 5168 until train came to stop seventy-one feet north of the crossing.

Dr. Philip Jones and the City ambulance were summoned. Mr. Tiller was placed in an empty box car and carried to Hull Street by yard engine. There he was placed in the ambulance. He was taken to the Memorial Hospital but account no vacant room available he was carried to the Grace Hospital. There he died at 4:25 a. m., March 22.

The crossing at time of the accident was already occupied by the yard engine handling 209's cars. The crew of 209 carried out the rules. In that this is a major injury to be investigated by the Legal Department no statements were taken by the Trainmaster.

Mr. Robert Scott.

Superintendent.

Mr. C. E. Saint-Amand,

Letter is attached from M. O. K. Fike, Managing Director, Grace Hospital, enclosing bills in the amount of \$172.69, plus nurses bills for \$18.00.)

BY MR. DENNY:

Q. This is a carbon of a letter written by Superintendent Murchison? A. Yes, sir.

Q. When that carbon was sent to Mr. Wall's office were the reports from the Trainmaster and Captain of Police attached to it or did they go to some other point? A. I couldn't say definitely that they came with this letter because I didn't see that portion of the file, only this copy, and the two forms I have mentioned, is the only portion of the file I have seen but I presume what Mr. Murchison has said there was attached to the file.

Q. If it had been attached to the file and sent to your office, what, in the ordinary routine, would have been done with the report of the Trainmaster and Captain of Police?

A. The chief clerk of the office, in handling the correspondence, would have removed the investigation portion of the file and passed to the General Superintendent.

Q. The General Superintendent is a man different from the Superintendent of Transportation, is he? A. That is right.

MR. DENNY: The other paper that he had before him is Form 169-A which we wish to introduce as Defendant's Exhibit E.

(This paper was filed and marked Defendant's Exhibit E and the following is a copy thereof:

ATLANTIC COAST LINE RAILROAD COMPANY

Northern }
Southern } Division.

April 9th 1940

To Superintendent Transportation:

Report of (kind of accident) Personal Injury At 3 M. P., near Clopton, Va.

1. Date 3-20-40. 2. Time 7:15 P. M. 3. Daylight or Dark Twilight. 4. Condition of weather Clear. 5. Train No. Extra. 6. Direction South. 7. Engine No. 1635. 8. Conductor R. W.

Wilbourne. 9. Engineer W. M. Myrick. 10. Fireman P. W. Wright (white). 11. Trainmen R. D. Owen, R. L. Dickens. 12. Speed of Train at time of accident 4 M.P.H. 13. Number of cars in train 3. 14. Number of loads None. 15. Tonnage of train ———. 16. Number of cars ahead of disabled car(s) ———. 17. Number of cars behind disabled car(s) ———. 18. Main line or siding Siding. 19. On level, fill or cut Level. 20. Tangent or curve Tangent. 21. Ascending or descending ———. 22. What distance did train move after accident 71 feet. 23. If in yard, track number or name Side Track.

CAUSE OF ACCIDENT

24. State fully *cause* of accident Not known. 25. If accident was at switch, who was handling it? ———. 26. State actual position of each trainman at time of accident Dickens near by, Owen at rear. 27. What signals, if any, were given; by whom, and were they obeyed? None. 28. If caused by defective brake or coupling apparatus, or other defect in rolling stock, fully describe same and give car number and initial ———. 29. Was defect apparent or concealed? ———. 30. Defect card attached? ———. 31. When and where last inspected? ———. 32. By whom? ———. 33. If caused by defect in track, bridge or roadway, describe such defect fully ———. 34. If accident due to carelessness, state where responsibility rests ———. 35. Show below initials, numbers, contents of all cars involved, and extent of damage to same:

Initial	Number	Kind	Contents	Damage to Cars	Damage to Freight
I N T	5168	H	mty	None	

36. Damage to locomotive ———. 37. Time track was cleared ———. 38. Delays to trains ———. 39. Was car set out or taken forward? ———. 40. Was drawhead and attachments taken forward with car? ———. 41. If not, state exactly where left, and why not taken with car ———. 42. Estimated total damage to Company's prop-

erty ———. 43. General Remarks: (Describe fully just what happened and how it happened) It is assumed that Mr. Tiller got off cars yard engine brought to Clopton for us to pick up and backed into the cars we were backing into side track to clear for yard engine to make a switch to our train which was standing on old branch line.

I came to office, got way bills and returned to caboose as customary.

Did not know of accident until arrival at South Rocky Mount.

I certify that the above is a true and correct report.

R. W. WILBOURNE Conductor.

W. M. Myrick Engineer.

————— Yard Master.)

MR. DENNY: On the back of it is simply medical data which, unless you gentlemen desire to be read, I don't think it is necessary to read.

Q. Did you have any other papers in the file at the time this report was made up? A. None whatever except these memoranda transmitting those reports.

Q. Do these memoranda contain any information concerning the facts of the accident? A. Absolutely none.

Q. If there be a difference between the statement contained in the report filed with the Corporation Commission and in these reports you had before you, how do you account for that difference? A. The report to the Corporation Commission is not copied from those two reports. In preparing that report to the Commission, I first read these reports that have been submitted and only refer to them insofar as time, dates, and the like, are concerned. In the brief explanation on the bottom of the report is the memorandum that I read and these telegraphic reports.

CROSS EXAMINATION

BY MR. SATTERFIELD:

Q. Mr. Parrish, when does the telegraphic document get to you? A. I couldn't say as to what date. I would say

around the 12th or possibly the 15th of the month following that in which the accident took place.

Q. You mean this was not telegraphed on the company telegraph wire? A. Yes, but it did not reach me.

Q. You received the wire, didn't you? A. Oh, yes.

Q. Is this it? A. That was received in the office at the time shown on the bottom.

Q. What is the time? A. 10:55 A. M., March 21st.

Q. You put that in the file, didn't you? A. That is right.

Q. Then this letter from Mr. Murchison came down dated April 4th? A. That was doubtless received on the 5th.

Q. Then you put that in the file? A. That is right.

Q. Then you received this, as I take it, at the same time Mr. Murchison's report came to you? A. No, that came in later on possibly April 14th. The memorandum is dated April 13th.

Q. This memorandum is? A. No, this memorandum.

Q. I call your attention that this one is dated April 9th. You got it on the 13th of April? A. About that.

Q. And these were put in your files? A. That is right.

Q. Against the day you would make the report? A. That is right.

Q. Did you use them in making up your report? A. You mean the Commission's report?

Q. Those three documents when you made this for your superior, Mr. Wall. A. No, sir.

Q. Why not? A. That report to the Virginia Commission was made after the report to the Interstate Commerce Commission covering the same case which was prepared from these two forms.

Q. When you made the I. C. C. report you made a copy of that for the Corporation Commission? A. No.

Q. Later then you made this for the State Corporation Commission? A. Yes.

Q. But you took what you had already sent to the I. C. C. as your report to the State Corporation Commission? A. That is right.

Q. But at the time you made it for the I. C. C. you had these before you? A. That is true.

Q. Are you sure, Mr. Parrish, that that was all the information that came to your desk as to how this accident occurred? A. That is the entire file, just as I handed it there a minute ago.

Q. You are sure of it? A. Yes, sir.

Q. And you knew when you prepared this for your superior, Mr. Wall, that he was required to swear to it? A. That is right.

Q. And file it with both the Corporation Commission and the Interstate Commerce Commission? A. That is right.

Q. And with these things before you, you wrote into this report that "J. L. Tiller, white, 52 years of age, Police Sergeant of the ACL RR Co., went with yard engine taking out of cars to Clopton, Va., to be placed in freight train stepped off engine upon arrival." You found that in those documents, so far as I have gone? A. I don't believe that is the exact wording in those two forms. I don't recall.

Q. "and was looking over the cars as they passed." Where did you get that from? A. Indicated in the form 169-A, I believe, that he was apparently watching other cars.

Q. "He was standing on adjoining track for this purpose." That is all right too? A. That is right.

Q. "when road engine with several cars ahead of the engine backed into this track and backed into Mr. Tiller." All of that is in those reports, is it not? A. That is right.

Q. And so you filed this report from those papers? A. With the one exception. I left one word in that report which is contained in both of these reports and also the report to the Interstate Commerce Commission.

Q. What word is that? A. "Apparent."

Q. Can you find anywhere in those reports the information that he was dragged down the track? I will first hand you Exhibit A. A. I see nothing in this particular form to indicate that.

Q. You put that in as an implication from his pistol, flash-

light and hat being found and the body on down the track? It was an assumption on your part? A. An assumption on my part.

Q. Because of the nature of his injuries? A. Yes, sir.

REDIRECT EXAMINATION

By MR. DENNY:

Q. Mr. Parrish, is the report to the Corporation Commission a verbatim copy of the report to the I. C. C. save for that word "apparent"? A. I couldn't say definitely that it is. It was not copied from the I. C. C. report.

Q. And I understand that when you made up the I. C. C. report you referred to this data you had in your file? A. That is right.

Q. Then subsequently you made up the report to the Corporation Commission? A. That is right.

Q. Did you make up the report to the Corporation Commission simply from memory or did you go back to the file? A. The only reference in making up the report to the Commission was the checking of the hearing of the Interstate Commerce Commission's report as to times, dates, etc., and then I went on with the explanation, as I remember having made it.

Q. You didn't check the factual statements, the facts of the accident, either with the data that you had in your file or with the copy of the report you had filed with the Interstate Commerce Commission? A. No. At the time I made this report I did not have the telegraphic portion of the file before me at all.

RECROSS EXAMINATION

By MR. SATTERFIELD:

Q. Is this a correct statement to the Corporation Commission? A. I haven't read that but I presume it is a copy.

Q. Read it and tell the jury if it is correct? A. That is a correct copy.

Q. I am asking you is that a correct statement? A. No.

Q. Wherein is it incorrect? A. I have made in this a positive statement as to what happened and I don't know what happened. If I had started with the word "apparently", it would have been a correct statement to the best of my knowledge.

Q. That is the statement you made and it is based on these documents, is it? A. That is right.

G. W. LINTON, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q. How long have you been an engineer on the Coast Line? A. Twenty-five years.

Q. Were you on duty the night that Mr. Tiller was fatally injured in Clopton Yard? A. Yes, sir.

Q. I don't think you understood my question. Were you an engineer there that night? A. Yes, sir.

Q. Of what train were you the engineer? A. I was carrying First 209 from Richmond to Clopton.

Q. You mean the yard engine from Byrd Street to Clopton? A. Yes, sir.

Q. When you went from Byrd Street to Clopton was your engine running forward or running backward? A. It was running backward.

Q. And pulling cars? A. Pulling cars.

Q. Did you see Mr. Tiller that evening? A. No, sir.

Q. Have you had experience in operating trains, both in lighted and in unlighted yards? A. Yes, sir.

Q. From your experience as an engineer, which yard do

you find is the easier in which to work and which, from your experience, is the safer? A. The unlighted yard.

Q. Why do you say that? A. Because the lights will shine right in your face at times and blind you and by the time you get out from that spot you are blinded and it is several seconds before your vision gets cleared up so that you will be able to see good again.

Q. On what kind of signals do you operate at night? A. Signals given with a lantern.

Q. Can you read the signals as easily in a lighted yard as in an unlighted yard? A. Sometimes you cannot see a signal in a lighted yard when it is in the ray of a light. It blinds out the lantern. It is impossible for you to see them at times.

CROSS EXAMINATION

By MR. SATTERFIELD:

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Q. Mr. Linton, I believe you have stated to the jury that you have seen him on numbers of occasions over there checking the cars—Mr. Tiller? A. Yes, sir.

Q. Will you tell the gentlemen of the jury where he very often stood to make that check? A. Mr. Tiller, when I would see him, would be around about different tracks. The train was always checked in the make-up in the yard and there was no specific place for him to be. I might see him in No. 5 track tonight and a little later I might see him around No. 2 track, just going around about.

Q. Was he on this run with you for any length of time? A. He has been over there quite a little while.

Q. What do you call quite a little while? A. I would say Mr. Tiller has been around there for ten or twelve years, to my knowledge.

Q. On that same job? A. Around the yard.

Q. In those same yards? A. Yes.

Q. Doing the same kind of work nightly? A. Yes, sir.

EDWARD F. ELLKE, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q. And how long have you been with the railroad? A. I judge thirty-seven or thirty-eight years.

Q. Were you the conductor on either of the trains that was in Clopton Yard on the evening Mr. Tiller was fatally injured? A. Yes, sir.

Q. You were the conductor of which train? A. Yard engine.

Q. Did you see Sergeant Tiller that afternoon or early evening? A. I saw him at Byrd Street Station.

Q. Where did you see him there? A. Well, we have what we call the wing of the bridge there. That was his position that he takes every evening to check the train.

Q. Is that on the north bank of the James River? A. Yes, sir, north bank.

Q. What time did you see him there? A. I judge around 6:30.

Q. Was that shortly before your train left Byrd Street Yard? A. Yes, sir.

Q. Did you see him thereafter? A. No, sir, I didn't see him after we left.

Q. Do you know whether he rode your train from Byrd Street to Clopton? A. No, sir, I do not.

Q. Have you worked in both lighted and unlighted yards? A. Yes, sir.

Q. Will you state to the jury from your experience which type of yard you find is the easier in which to do your work and which type of yard, from your experience, is the safer in which to do your work? A. I prefer the dark yard. The signals are more visible.

Q. Are there any other reasons? A. I think it is safer.

Q. Why? A. Because signals are more visible in yard work.

CROSS EXAMINATION

BY MR. SATTERFIELD:

Q. Mr. Ellke, you have been with the railroad company thirty-seven years. Do you know why the railroad companies are lighting their yards now? A. I don't know of any benefit, only to see.

Q. That is pretty good benefit, isn't it? A. Yes, to see by but when you are facing the light it blinds you.

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Q. Do you mean to tell this jury a man could not so protect his eyes as to benefit by lights in a railroad yard as between that and a dark yard? A. Well, the position he takes, if his back is toward the light, it is a benefit to him but when he is working against the light, it is a disadvantage to him.

Q. When a large yard is properly lit like Acca, for instance, do you say that yard should be avoided for one that is dark? A. I say I fell over a switch over there on account of the lights. I couldn't see the switch. The switch was located between the tracks.

Q. You prefer your dark yard at Clopton to one lit as well as Acca is? A. Yes, sir, I prefer the dark yard.

Q. You knew that night there was a car in the wrong place in that train? A. I never knew it until I arrived at Clopton.

Q. When you got to Clopton you knew about it? A. Yes.

Q. And you knew that occasioned the shifting movements there? A. Yes, sir.

Q. You were there that night. Will you state to the jury whether or not, in your opinion, it would have been easier for Mr. Tiller to have been seen that night had the yard been lighted? A. Could have been seen?

Q. Easier for him to have been seen. A. I don't know what position Mr. Tiller was in.

Q. Assuming that he was standing just north of Clopton Road, between the southbound rail and the slow siding. A. I judge he could have been seen.

REDIRECT EXAMINATION

By MR. DENNY:

Q. If Mr. Tiller had been standing there with a flashlight turned on, would Mr. Tiller and that light have been more clearly seen in a dark yard or lighted yard? A. Well, he flashed his light on the seals of the cars. He didn't have his light burning continuously. He just flashed his light on each car.

Q. Would that light be seen more easily as he flashes it in a dark yard or lighted yard? A. That is practically a signal in a dark yard. You could see it better.

RECROSS EXAMINATION

By MR. SATTERFIELD:

Q. You say he didn't keep the flashlight on all the time; it was coming on and off? A. He used it for each seal on each car.

Q. Will you take this flashlight. You are familiar with flashlights, aren't you, Mr. Ellke? A. To some extent. I don't use them very often.

Q. I want to ask you if you can tell the jury how that light is put on and off. A. He put it on this way and would catch the next car as it passed by while it was moving.

Q. You mean as he would see one seal he would wait until the next car got there and put it on the seal? A. Yes.

Q. Saving the battery? A. Saving the battery, I presume.

By MR. DENNY:

Q. You, of course, don't know whether Mr. Tiller was doing that on that night or not? A. No, sir, I didn't see him.

G. L. KING, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

* * * * *

Q. Were you connected with either of the train crews which were in Clopton Yard on the night Mr. Tiller was fatally injured? A. Yes, sir.

Q. With which crew were you connected? A. Mr. Ellke's yard crew.

* * * * *

Q. Did you see Sergeant Tiller that evening? A. No, sir.

Q. Did you see him in Byrd Street Yard that evening? A. No, sir.

Q. If he rode your train to Clopton Yard, do you know the position where he rode? A. No, sir.

Q. Have you worked both in lighted and unlighted yards? A. Yes, sir.

Q. From your experience as a trainman and doing the work you are called on to do, which do you prefer, a lighted or an unlighted yard? A. An unlighted yard.

Q. Why? A. Because you can see signals better.

Q. Have you any other reason? A. No.

Q. You can get a wider view.

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CROSS EXAMINATION

BY MR. SATTERFIELD:

* * * * *

Q. How long have you been working in those yards? A. I have been there twenty-five years.

Q. Always on the yard crew? A. Yes, sir.

Q. You never had any experience with the road engine crew? A. Only to see them come there and pick up a train is all.

Q. But you are familiar with what happens there each night, are you? A. Yes, sir, somewhat, I am.

Q. When the road engine comes over from Acca where does it usually go to get out of the way while the yard engine makes up 209? A. Different times he makes different moves.

Q. You mean the yard engine? A. No, sir. Sometimes the man will cut off and get out one way and then again he will cut off and back up so the yard engine can get there and do the work.

Q. They had a car out of place that night, didn't they? A. Yes, sir.

Q. And they had to put it in its proper place; is that right? A. Yes.

Q. Where did they have to put that car that was out of place? A. They had to put it in the Jacksonville classification, up to the hill on the road man's train.

TURNER A. COLE, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. Did you work for the Coast Line in March of 1940? A. Yes, sir.

Q. What position did you hold then? A. Fireman.

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Q. Were you on duty with either of the train crews in Clopton Yard on the night that Sergeant Tiller was fatally injured? A. Yes, sir.

Q. With which crew were you on duty? A. Mr. Ellke's crew.

Q. By that do you mean the yard crew? A. Yes, sir.

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Q. Did you see Mr. Tiller that night? A. No, sir, I did not.

Q. Did you see him at Byrd Street Yard before you left? A. No, sir.

Q. You did not see him on the train going over? A. No, sir.

Q. Or in Clopton? A. No, sir.

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Q. Have you worked both in lighted and in unlighted yards? A. Yes, sir, I have.

Q. From your experience in working in each type of yard, which do you find is the easier to work in and which is the easier in which to do your work? A. In Petersburg they have a lighted yard and when you are backing back in the yard it is right blinding for the man running the engine. You can't see very good because it seems to blind you, the way they have the lights fixed.

Q. What yard is that in Petersburg? A. That is in the Norfolk & Western yard.

Q. How about other yards or have you any preference between lighted and unlighted yards? A. I can't say that I have. I believe I would rather work in one that isn't lighted on account of it not blinding.

Q. It doesn't make much difference to you? A. No, sir. I believe I would rather work in one that isn't lighted because it doesn't blind you and you can see the moves you are making.

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RICHARD DUDLEY OWEN, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

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Q. Do you work with the Atlantic Coast Line? A. Yes.

Q. What position did you hold in March of 1940? A. Flagman.

Q. Were you connected with either of the train crews that were in Clopton Yard on the night Mr. Tiller was fatally injured? A. Yes, sir.

Q. With which crew were you connected? A. 209.

Q. What do you mean by 209? Was that the crew from Byrd Street or was it the crew from Acca? A. The crew from Acca.

Q. Who was your conductor? A. R. W. Wilbourne.

Q. Was anyone else in the caboose with you? A. Conductor.

Q. Mr. Wilbourne, the conductor? A. Yes, sir.

Q. What did you do when you got to Clopton? A. Stayed to the rear to protect the rear of the train.

Q. What did Mr. Wilbourne do? A. Went to Clopton Yard office to get his bills.

Q. Did he come back very shortly with his bills? A. Yes, I would say in ten or fifteen minutes.

Q. Then what did he do? A. Stayed on the cab and wrote the bills up and went on to Rocky Mount.

Q. Did you and he, from the time he got the bills, continuously stay there in the caboose? A. Yes, sir.

Q. Until you got to Rocky Mount? A. Yes, sir.

Q. When did you learn that Mr. Tiller had been hurt? A. At Rocky Mount, South Rocky Mount.

Q. Was Mr. Wilbourne back in your caboose prior to the time Mr. Myrick cut off with three cars on the front of your train, or could you tell? A. I couldn't tell.

Q. Is Mr. Wilbourne alive or dead now? A. He is dead.

Q. Have you worked in both lighted and unlighted yards? A. Yes, sir.

Q. From your experience, which type of yard do you find you prefer and which type of yard do you think is the safer in which to work? A. An unlighted yard.

Q. Why do you prefer the unlighted yard? A. You can see hand signals, lamp signals, better without obstructing from shadows. You can't see in shadows in an unlighted yard.

Q. Did you see Mr. Tiller at all on this day when he was fatally injured? A. No, sir.

L. E. HUDSON, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q: You are the General Yardmaster of the A. C. L. here at Richmond? A. Yes, sir.

Q. How long have you occupied that position? A. Since 1938.

Q. Were you on duty at Clopton Yard the night that Sergeant Tiller was fatally injured? A. Yes, sir.

Q. Were you out there? A. No, sir.

Q. Mr. Hudson, have you looked up the records to ascertain the number of the hopper car, the type and number, immediately behind the road engine operated on that occasion by Mr. Myrick? A. Yes, sir.

Q. What was the first of those hopper cars, the one right behind Mr. Myrick's engine? A. It was N. & W. empty coal hopper, empty hopper.

Q. Do you know the number of it? A. N. & W. 22020.

Q. Do you know what the exact type of the second hopper car was? A. Same type.

Q. Do you know the number of it? A. 22844 N. & W.

Q. Do you know the type of the third hopper car? A. Yes, sir, INT 5168, the same general type.

Q. Is there any data that you gentlemen have showing you the exact height of these various hopper cars? A. Yes, sir.

Q. What is the data that you have? A. The authority or the height?

Q. The authority. A. The Railroad Equipment Register.

Q. Is this the Railway Equipment Register? A. Yes, sir.

Q. With reference to these hopper cars, before you refer to this will you explain the data that it gives? A. It gives the type, all dimensions of the cars, and the cubic capacity and the number of doors and the entire information necessary in ascertaining the disposition to make of such cars.

Q. By whom is that published? A. Railway Equipment Register people.

Q. Will you turn there and state to the jury what was the height at the end of this hopper car immediately adjacent to Mr. Myrick's engine? A. N. & W. 22020, N. & W. 22000 to 25999, which governs both cars, the extreme height 12 foot 3 inches.

Q. That is the height on the ends? A. That is right.

Q. Is that taken from the rail? A. From the top of the rail to the top of the car.

Q. Was the second car also 12 feet 3 inches? A. Yes, sir.

Q. How about the third car, the one in which Mr. Tiller was found caught up? A. INT cars 5000 to 7009 (this car was 5168) over all 11 foot $9\frac{3}{4}$ inches in height.

Q. Do you know the engine that Mr. Myrick was operating that night? A. I know the class of engine, B-5.

Q. Have you data showing the height of the tender, the rear end of the tender on that engine? A. I do not have the data but I have measured it.

Q. What is the height? A. 10 foot 8 inches from the top of the rail to the top of the tank.

Q. If you had a regular headlight mounted on top of the tender, how far above the top of the tender would the top of that headlight be? Do you know the height of a headlight? A. The overall diameter of a headlight is $15\frac{1}{2}$ inches, standard type headlight which we use. That would bring that particular headlight—

By MR. SATTERFIELD:

Q. The diameter? A. The diameter of the headlight overall is $15\frac{1}{2}$ inches.

By MR. DENNY:

Q. What do you mean by "overall?" A. The rim, including the entire light from the bottom of it to the top of it, 15½ inches.

Q. How high did you say the tender was off the ground? A. The tender is 10 foot 8 inches. That would give you—the headlight would be 11½ inches mounted on the back of that tank.

Q. Hopper cars have no tops on them? A. No, sir.

Q. Have they a flange that runs around the rim of the top? A. Yes, sir.

Q. Have you ascertained what is the width of that flange on an INT car of this type on the ends? A. That is a 3-inch angle iron, making a flange 3 inches.

Q. Is that sufficient room on which to stand a lantern when cars are moving? A. Absolutely not.

CROSS EXAMINATION

By MR. SATTERFIELD:

Q. What sort of light, Mr. Hudson, did the tender of this locomotive, the road engine, have on it at the back that night? A. It had an ordinary small white light.

Q. What power light is that? A. I don't know.

Q. Is it very small? A. Very small.

Q. With the height of the gondola that was next to the tender, which I believe you said was 12 feet 3 inches, would the flange on top of that gondola be above the light that was on the engine that night? A. Yes.

Q. So that would hide that light from any movement in the direction from which the back-up movement was being made? A. Yes, sir.

J. A. CREWS, a witness called by the defendant and being first duly sworn, testified as follows:

EXAMINED BY MR. DENNY:

Q. How long have you been a car inspector for the Coast Line? A. Twenty-one years.

Q. And during that time have you worked very frequently here in the Richmond yards? A. All the time, yes, sir.

Q. Were you on duty the night Sergeant Tiller was fatally injured? A. Yes, sir.

Q. Did you have any work to do in connection with the cars that were subsequently carried by the yard engine out to Clopton for First 209? A. Yes, sir, I inspected them and tested air on them.

Q. Did you, after doing that, have occasion to go to Clopton Yard? A. Yes, sir.

Q. How did you go to Clopton Yard? A. I went there in my automobile.

Q. Did anyone go with you? A. No, sir.

Q. When you reached Clopton Yard had the road engine from Acca come into the yard? A. It hadn't showed up but a very few minutes after I got there he showed up.

Q. Had the yard engine from Byrd Street gotten there when you reached there? A. No, sir.

Q. You drove in on Clopton Road from the Petersburg Pike? A. From Petersburg Pike and drove right in here, right in between what we call the hill track and slow siding, parked my car right in here.

Q. You parked your car in the area between the old James River line and slow siding? A. Yes, just cleared the road.

Q. On the north side of Clopton Road? A. On the north side of Clopton Road.

Q. Was anybody else out there at Clopton Yard that night when you got there? A. I was the first one there.

Q. Then I understand you to say very shortly after you got there the road engine came in? A. Yes, sir.

Q. When you got there what did you do? A. I sat in the car until 209 showed up.

Q. Do you mean the road engine? A. The yard engine.

Q. You sat in the car until the yard engine came along? A. Yes, with the train.

Q. Then what did you do? A. After he blowed the road crossing I was getting out of the car, you see, starting on down where I make the coupling for the road engine.

Q. Let us get your movements in relationship to these tracks. Your car— A. It was parked right here.

Q. At the point you have indicated? A. Yes, sir.

Q. While the yard engine was coming in you got out of your car? A. Got out of my car.

Q. And which way did you walk? A. I walked south between slow siding and the main line. I was right in between them.

Q. Did you cross slow siding? A. I crossed slow siding in here somewhere. I don't know whether it was north of it or south of it but I crossed it.

Q. You crossed slow siding there at the crossing of Clifton Road? A. Yes.

Q. When you crossed slow siding to get in the area between southbound main line and slow siding had the yard engine come to a stop or do you know? A. I don't remember.

Q. Where was the road engine? A. The road engine had pulled down then.

Q. What do you mean by "pulled down"? A. Pulled down the old branch line here, the hill track, down to the switch, and when I got up there, as well as I remember, he was backing back. The brakeman was trying to back and was up on the car coming back.

Q. As you crossed slow siding did you see the brakeman on the head of Mr. Myrick's back-up movement, flagging Mr. Myrick back? A. Yes, sir.

Q. Had Mr. Myrick begun to back when you crossed slow siding by Clopton Road? A. I don't know, sir. I was right in here somewhere and I walked in between the two trains.

Q. As Mr. Myrick backed up and as you walked in between the slow siding and southbound main line, were you crowded in there or did you have room enough to walk?

A. It is room enough for you to walk but you can't make no mis-steps in there.

Q. Did you see, when you crossed slow siding there at Clopton Road, Sergeant Tiller? A. No, sir.

Q. Did you see anyone in that general locality with a flashlight? A. No, sir.

Q. Did you see any sign of a flashlight, either on or blinking on and off? A. No, sir. I was headed south.

BY MR. SATTERFIELD:

Q. You were what? A. I was going south.

BY MR. DENNY:

Q. Did you see Sergeant Tiller that evening at all? A. I went to see him in Richmond. I usually seen him every evening but I can't remember whether I saw him that evening.

Q. You can't remember whether you saw him at Clopton Yard? A. I didn't see him until after he was hurt.

Q. I understand you have frequently been in Clopton Yard? A. Yes, sir.

Q. Are any particular tracks regularly used in the make-up of First 209 there in Clopton Yard? A. No, sir, no special track.

Q. Have you ever been in Clopton Yard on occasions when the road engine, either by itself or pulling some other cars, had to get out of the way so that the yard engine might make up the train? A. Yes, sir. It happens real often.

Q. Will you state to the jury some of the various tracks that you have seen the road engine use as it gets out of the way to permit the yard engine to make up the train? A.

Well, I have seen them use the same track, slow siding as it is known, and 1 and 2. I have seen him use them all practically.

Q. At one time or another you have seen him use practically every track? A. Yes, sir.

Q. Is there any regular movement there that takes place or is it simply whatever movement may be convenient to handle the particular problem? A. That is right.

CROSS EXAMINATION

By MR. SATTERFIELD:

Q. Did I understand you to say, Mr. Crews, that you had seen Mr. Tiller before his death? A. No, I didn't see—

Q. I don't mean that night. I mean frequently on other occasions at night, looking after the inspection of the cars there in the yard? A. Oh, yes, sir, I have seen him there.

Q. Is it not a fact that he usually stood there between slow siding and the southbound main line to make that inspection with the flashlight? A. Well, I have seen him make the inspection there.

Q. You have seen him do it frequently there? A. Yes, I have seen him.

REDIRECT EXAMINATION

By MR. DENNY:

Q. You have also seen Mr. Tiller at many other points in Clopton Yard? A. Yes, sir.

Q. Inspecting seals at many other points? A. Yes, sir.

Q. In the years that you and he worked together in Clopton Yards, I take it, you have seen him at almost every place in the yard? A. Yes, sir, I have seen him everywhere.

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MR. DENNY: The defense rests.

THE COURT: Is there any rebuttal?

MR. SATTERFIELD: No, sir.

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MR. DENNY: I wish, if the Court pleases, to reiterate my first motion.

THE COURT: To renew it?

MR. DENNY: To renew my first motion that a verdict be directed for the defendant and for the reasons I stated earlier in the day.

THE COURT: That motion is overruled.

MR. DENNY: I now wish to renew my motion that the portion of the amended complaint which relates to the Boiler Inspection Act and to the rules and regulations of the I. C. C., promulgated thereunder, be stricken and that all the evidence which might have any relationship solely to the Boiler Inspection Act be stricken for the reasons heretofore stated.

THE COURT: That motion is overruled.

MR. DENNY: Exception is noted, of course, in each case.

There is another motion I want to make which I should like to make at this time. My motion is that the report filed with the State Corporation Commission be stricken from the evidence because the report is now shown by the evidence, and conclusively shown by the evidence, to be inaccurate. The report is not stated in accordance with the reports that came to Mr. Parrish. Mr. Parrish simply made a blatant mistake in the report to the Corporation Commission and I don't think that where an employee, who knows nothing about the matter of his own knowledge but who, in the nature of things, relies on other reports that come to him, binds the railroad if he erroneously reports to the State Corporation Commission. Mr. Wall, who signed the report, has testified that he knew nothing of the matter, that he had seen none of the reports in his office, and signed it as a matter of routine. Any high official has to do a great deal of routine. Mr. Parrish is the man who prepared the report. We have in evidence the data that Mr. Parrish had before him, which data shows that nobody knows what Mr. Tiller was doing. One statement says "apparently." The other statement says "It is assumed." The statements say

there were no witnesses and this report was originally admitted in evidence as an admission against interest. We have shown who made the report, that he knew nothing of his own knowledge, and that in making the report he didn't even follow the data he had before him and I say, under those conditions, a report of that kind is not entitled to any consideration by the jury.

THE COURT: I think the plaintiff is entitled to have it introduced in evidence as an admission against interest for what it is worth under all the facts and circumstances shown in the evidence, and the motion is overruled.

MR. DENNY: We note an exception.

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CHARGE TO THE JURY

THE COURT: Gentlemen of the Jury, this is a suit by Hattie Mae Tiller, widow and Executor of the Estate of John Lewis Tiller, against the Atlantic Coast Line Railroad Company, for damages in the sum of \$50,000.00 for the death of the said John Lewis Tiller, which the plaintiff claims was caused by the negligence of the defendant.

The suit is brought under what is known as the Federal Employers' Liability Act. The said Act gives to employees of common carriers by railroad engaged in interstate commerce, or their personal representatives, a cause of action against such railroad for damages for injuries or death resulting from the negligence of the railroad or any of its employees, or from any defect or insufficiency due to negligence in its cars, engines or other equipment.

It is conceded by the defendant that John Lewis Tiller died as a result of injuries received while employed by the defendant, which was then engaged in interstate commerce, and that the plaintiff has the right to maintain this suit in this Court for damages for the benefit of herself and the minor son of the decedent.

The plaintiff's case, stated briefly, is as follows: On or

about March 20th, 1940, in the afternoon but after darkness prevailed, the defendant through its employees was engaged in shifting cars in and about its yard known as Clopton Yard near Richmond, Virginia, in order to make up a southbound freight train; that at the same time John Lewis Tiller in the performance of his duties as an employee of the defendant was inspecting seals on cars in the yards; that the defendant on the occasion in question through its employees performed the said operation in a negligent manner, and that the defendant then violated the Federal Boiler Inspection Act by reason of certain defects or insufficiencies in the cars, engines or other equipment used in such operation, and as a proximate cause of such negligence and violation of law, a car propelled by the defendant's locomotive and operated by its train crew ran over and crushed the said John Lewis Tiller causing injuries from which he died.

The defendant is defending the suit on several grounds. The defendant contends that it was guilty of no negligence which was a proximate cause of the death of the decedent, and even if it were guilty of negligence, the decedent was also guilty of contributory negligence which efficiently contributed to his death.

This in a very general way outlines for you the issues of fact which you are called up to determine by your verdict in the light of the evidence you have heard and the law as explained in the charge of the Court.

Before explaining to the jury the law relating to the issues of fact raised by the evidence which has been adduced before you, I think it important to outline for you certain general principles of law which are controlling upon the jury in arriving at your verdict.

The Court charges the jury that this is a case of negligence, that is to say, the plaintiff claims the right to recover damages from the defendant by reason of its alleged negligence. Negligence is defined as the failure to do what a reasonably prudent man would have done under the same circumstances or doing what such person would not have

done under such circumstances. The plaintiff contends that the defendant was negligent in two respects, namely, (1) the failure to perform certain general duties owed by an employer to its employees; and (2) the failure to obey and observe certain statutes enacted by the United States for the safety of employees of carriers engaged in interstate commerce, as well as certain rules and regulations promulgated in pursuance of such statutes. It is therefore incumbent upon the plaintiff to satisfy the jury by a preponderance of the evidence that the decedent met his death as a result of the defendant's negligence. The plaintiff is not entitled to recover merely because of the happening of an accident.

The Court further charges the jury that it is not only necessary that the plaintiff should satisfy the jury by a preponderance of the evidence that decedent met his death as a result of the defendant's negligence, but the burden also rests upon the plaintiff to likewise prove that such negligence was the proximate cause of the injury which resulted in the death of the decedent. In order to establish that a negligent act or acts constituted a proximate cause of an injury, it must appear that the injury complained of was the natural and probable consequence of the alleged negligence, and that it ought to have been foreseen in the light of the attending circumstances.

The Court will hereafter explain to the jury the extent to which the defense of contributory negligence on the part of the decedent is applicable to the facts of this case. At this time it is sufficient to say that insofar as such contributory negligence is applicable, the burden is upon the defendant to prove negligence on the part of Mr. Tiller, unless it appears from the plaintiff's evidence or may be fairly inferred from all the facts and circumstances shown in the evidence.

Preponderance of the evidence does not necessarily mean the greater number of witnesses; it does mean the greater weight of all the evidence before the jury.

The Court charges the jury that they must not allow any sympathy they may feel for any person to influence their

verdict. A verdict, either as to liability or amount of damages, should not rest upon sympathy, surmise or conjecture, but must be based upon the evidence before the jury and the law as explained in this charge of the Court.

The credibility of witnesses, by which is meant their worthiness of belief and the weight to be given their testimony, is the peculiar function of the jury. There is no absolute or arbitrary guide or measure by which the jury may determine the truthfulness or untruthfulness of the witnesses. In determining the credibility of a witness, you should consider whether the witness has any reason or motive for being truthful or untruthful, whether there has appeared from the attitude or conduct of the witness any bias, prejudice or feeling which may cause his testimony to be influenced thereby, whether his testimony bears the mark of truthfulness or untruthfulness, and to what extent it is corroborated and confirmed by other testimony which is not questioned. You may also consider the intelligence or lack of intelligence of a witness and his opportunity to have accurate knowledge of the matters to which he testifies. In other words, you should consider the testimony of the witnesses in connection with all the facts proven and determine the degree of credibility you will give the witness and the weight you will give to his testimony.

As already explained to the jury the defendant is defending this suit on the ground that it was guilty of no negligence which was a proximate cause of the death of the decedent. In addition to said defense, the defendant has interposed a plea of contributory negligence on the part of the decedent which the defendant claims efficiently contributed to the death of Mr. Tiller.

In this connection, the Court charges the jury that contributory negligence on the part of the decedent can in no event serve to defeat a recovery by the plaintiff if the jury believe from the evidence that the defendant was guilty of negligence which was a proximate cause of the accident in which Mr. Tiller lost his life. And the Court further charges

the jury that the jury may not even consider the defense of contributory negligence in connection with the charge that the defendant violated the laws, and rules and regulations promulgated in pursuance of said laws, enacted and adopted for the safety of the employees of carriers engaged in interstate commerce. The Court further charges the jury that the jury may consider such defense of contributory negligence only in connection with the charge that the defendant was negligent in that it violated one or more of the above mentioned general duties which the defendant owed to its employees, and only for the purpose of mitigating the amount of damages the plaintiff is entitled to recover should the jury believe she is entitled to recover at all.

This brings me to the law of this particular case.

The Court charges the jury that the defendant on the occasion in question owed to its employees, including the said John Lewis Tiller, certain general duties. Among such duties were the following: (1) to exercise ordinary care to furnish its employees with a reasonably safe place to work; (2) to give adequate warning of any unusual or unexpected movement in making up its trains.

In addition to the general duties which the defendant owed its employees, there were, at the time of the accident, in full force and effect certain statutes enacted by the United States for the safety of employees of common carriers by railroad, known as the Federal Boiler Inspection Act, as well as certain rules and regulations promulgated by the Interstate Commerce Commission in pursuance of such statutes, which it was the duty of the defendant to obey and observe.

The Court charges the jury that it was the duty of the defendant to exercise ordinary care to provide the decedent with a reasonably safe place to work, that is to say the degree of care that persons of ordinary prudence engaged in the same business would have exercised under like circumstances. And if the jury believe from the evidence that on the occasion in question, taking into account all the facts

and circumstances shown in the evidence, the defendant failed to perform such duty and as a proximate result of such failure the plaintiff's decedent received injuries from which he died, then the jury should return a verdict for the plaintiff.

The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back-up movement on the night of March 20th, 1940; that such movement was an unusual and an unexpected one and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff.

The Court charges the jury that Clopton Yard is used by the defendant for the purpose of classifying its cars and making up its trains, and that a locomotive used in said yard in classifying cars and making up trains is engaged in yard service. If the jury believes from the evidence that the road engine, on the night Mr. Tiller was injured, in making the movements it made in said yard was being used by the defendant to classify its cars and make up its train, then the said engine was then being used in yard service. On the other hand, if the jury believes from the evidence that the said road engine was backing into slow siding for the purpose of getting out of the way of the yard engine so that said yard engine could classify cars and make up trains, then said locomotive in making said movement was not being used in yard service.

The Court further charges the jury that the Federal Boiler Inspection Act and the rules of the Interstate Com-

merce Commission adopted pursuant thereto require that a locomotive used in yard service between sunset and sunrise should have two lights, one on the front of the locomotive and one on the rear, each of which should enable a person in the cab of the locomotive who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 300 feet ahead and in front of such headlight. If the jury believe from the evidence that the decedent was struck, between sunset and sunrise, by a car which was being pushed by a locomotive and that said locomotive was then being used in yard service and that said locomotive did not have a rear light as prescribed by said rule and as a proximate result of such failure to have such a light on the rear of such locomotive the said Tiller received injuries from which he died, then the jury should return a verdict for the plaintiff.

The Court charges the jury that a railroad is not bound to maintain its yards in the best or safest condition. To such extent as any statute or regulation promulgated pursuant to statute requires any specific mechanical device or facility, the railroad must furnish it, but no statute or regulation requires it to light its yards.

The plaintiff has offered in evidence certain rules from the rule book issued by the defendant to its employees. The Court charges the jury that if they believe from the evidence that the defendant violated these rules then the jury may consider such violations along with all the facts and circumstances in this case in determining whether the defendant was guilty of negligence which proximately caused the injury to the decedent.

If the jury believes from the evidence and under the charge of the Court that the plaintiff is entitled to recover, then in fixing the damages to which the plaintiff is entitled the jury may take into consideration the following:

(1) The pecuniary loss sustained by the widow and minor son of the deceased to be determined in the light of his prob-

able earnings during what would have been his normal lifetime if he had not been killed and considering his age, intelligence and health at the time of his death.

(2) The probable lifetime of the deceased may be determined by the jury according to the recognized scientific tables relating to human life.

(3) A sum of money deemed fair and just by the jury for the loss of care, attention and society of Mr. Tiller to his surviving widow and child.

(4) A sum of money deemed fair by the jury by way of solace and comfort for the sorrow, suffering and mental anguish occasioned by the widow and child of the decedent.

(5) The pain and suffering experienced by Mr. Tiller between the time of his injuries and his death.

The Court charges the jury that should they return a verdict for the plaintiff such verdict should be in the following form:

"We, the jury, on the issue joined, find for the plaintiff, and assess the damages at \$———."

September —, 1943.

Foreman

The Court charges the jury that should they return a verdict for the defendant such verdict should be in the following form:

"We, the jury, on the issue joined, find for the defendant."

September —, 1943.

Foreman

To summarize briefly, gentlemen of the jury, the Court again says to you that this is a case of negligence, that is to say, the plaintiff's right to recovery is dependent upon whether or not the defendant has been guilty of negligence. The jury should first consider whether or not the defendant was guilty of negligence and whether or not such negligence, if they jury believes it existed, was a proximate cause of the

injury and resulting death of the decedent. If you find neither of these conditions existed, you should return a verdict for the defendant. On the other hand, if you believe both of such conditions existed, you should next consider whether or not Mr. Tiller was also guilty of negligence which efficiently contributed to his death. If you believe from the evidence he was not, then you should return a verdict for the plaintiff and award damages in such sum as will fully and fairly compensate for the injury and death of the decedent. However, if you believe from the evidence that the defendant was guilty of negligence which was a proximate cause of the accident in which decedent lost his life, and further believe that the decedent was also guilty of negligence which efficiently contributed to his own death, then you should first determine the whole amount of damages sustained by reason of the injury and death of Mr. Tiller, and having done so, you should, provided you believe from the evidence and under the law as hereinbefore explained to the jury that such contributory negligence should be considered by the jury, diminish the whole amount of such damages by deducting therefrom such part thereof as you may believe from the evidence is justly and fairly attributable to the negligence of Mr. Tiller, and return a verdict for the plaintiff for the balance which remains.

If there is any matter that I can assist the jury with, I will be glad to do so.

Do you gentlemen, before the jury retires to deliberate, wish to state any additional objections to the charge of the Court?

MR. DENNY: I think it would be advisable. Under Rule 51^a we would be compelled to do it at this time.

THE COURT: Gentlemen, step out in the hall.

(The jury retired)

THE COURT: Mr. Denny, there is no use in putting into the record now any matter that you have heretofore brought to the attention of the Court. Has the plaintiff anything to put in?

MR. GARY: I could not recall whether our objections to the instruction on proximate cause were recorded or not. Our objection to any reference to promixate cause in the instructions is based upon our contention that under the Federal Employers Liability Act, the question of proximate cause has been eliminated by the Act itself and that the plaintiff is entitled to recover for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, and that the expression in the law "injury or death resulting in whole or in part from the negligence of the officers," etc., determines the negligence for which the plaintiff is entitled to recover and that that eliminates the question of proximate cause.

THE COURT: I think you have made that point before and I am glad to have you put it in the record but I will not change my charge on that account.

MR. GARY: The other objection is that in its request for instruction, the plaintiff asked for an instruction that it was the duty of the defendant in this case to exercise reasonable care to provide the decedent Tiller with a reasonably safe place to work which included care in establishing a reasonably safe system or method of work. The "reasonably safe system or method of work" was eliminated.

As I recall the instruction with reference to whether or not the engine was engaged in road service, the Court instructed the jury that if they believed from the evidence that the engine which struck Tiller backed into slow siding to get out of the way while the yard engine was classifying the train, then it was not engaged in yard service. We think that that should be "merely backed in for that purpose." If it backed in for that purpose and other purposes, then we feel that we are entitled to the instruction.

THE COURT: I think that point is fully covered by the instruction.

MR. DENNY: If the Court pleases, simply to make sure that the objections which we will dictate in full have been

covered by the Court, we will object to this instruction upon the ground, first—

THE COURT: Which instruction?

MR. DENNY: I will point out the reasons. I don't know the numbers that may be there. It is the Court's instruction on the unusual and unexpected movement.

THE COURT: You have put that in the record?

MR. DENNY: We have mentioned that heretofore, I know. We object because the Court should, under the facts of this case, have instructed as a matter of law that this engine was engaged in road service and we will further object upon the ground that the Court did not include in its instruction the statement that no statutory regulation requires that if an engine pushes a car within a yard at night a light be placed on the head end of the back-up movement.

We further object because the Court did not—

THE COURT: You cannot negative every requirement. I cannot tell the jury what is not the duty; I can only tell them what is the duty.

MR. DENNY: I understand, but we still object upon that ground. I wanted to be sure that all of my points are properly saved.

THE COURT: The object of these objections is to attempt to have the Court change the charge.

MR. DENNY: I thought I needed to be sure that I had stated what they were before the jury retired. I did not want to engage in any further argument on the instructions. As I understand the Court's interpretation of Rule 51, even after the jury has retired we can state these things and that is in keeping with Rule 51.

THE COURT: All right.

(The jury returned to the court room)

THE COURT: Gentlemen, retire and deliberate upon your verdict.

The jury retired to consider its verdict and later returned a verdict in the following words:

“We, the jury, on the issue joined, find for the plaintiff and assess her damages at \$22,500.00.”

MR. DENNY: If the Court pleases, the defendant moves to set aside the verdict.

THE COURT: May I suggest that you have ten days in which to make a motion and state your grounds. Is there anything further?

MR. DENNY: May I do this with these objections to the instructions which I have summarized in longhand—may I have them written up on the typewriter and submitted to the Court?

THE COURT: Tomorrow.

Thereafter Mr. Denny filed the following objections to the charge:

The defendant objects to the charge of the Court to the jury upon the following ground:—

1. The Court should have charged that the road engine from Acca was engaged in road service during the back-up movement into slow siding, when J. L. Tiller was injured, and the Court erred in leaving the question whether the movement was one in road or yard service to the determination of the jury, as there is no evidence upon which to predicate a finding that said engine was engaged in yard service. This question is one of law to be determined by the Court.

2. The Court should have charged there was no evidence upon which there could be predicated a finding that defendant was negligent, because the manner in which J. L. Tiller received his injuries is purely speculative and conjectural.

3. There is no evidence upon which to predicate a charge concerning an unusual or unexpected movement or a departure from a general practice in the movement during which the injuries were sustained. The Court should have charged that there was no evidence of an unusual or unexpected movement or a departure from a general practice, of which plaintiff's decedent should have been warned.

4. Those portions of the charge which relate to the matter of an unusual or unexpected movement and a departure from general practice do not correctly state the principle of law governing such matters. If proper to instruct on these points, the Court should have instructed in effect as follows: that if the jury believed from the evidence that by practice or otherwise a custom had been established in Clifton Yard against the backing of cars into slow siding, and that this custom had been established for the benefit of members of the police force and/or others, and that this custom had been violated without warning to J. L. Tiller, and that such violation was a proximate cause of his injuries, then its verdict should be for the plaintiff.

5. The Court should have charged that no applicable statute or regulation adopted pursuant to applicable statute imposes the duty upon the defendant to place a light of any kind on the lead end of a car or cars that are being pushed by a locomotive in the nighttime.

6. The Court should have charged that such matters as the space to be maintained between tracks in railroad yards and other engineering questions are left to the decision of the railroad, and its decision on such matters is not reviewable by the jury. Such matters are not to be left to the uncertain and varying opinions of juries.

7. The Court should have charged that the report to the Virginia State Corporation Commission, filed as an exhibit by plaintiff, could not be considered by the jury.

8. The Court should have charged that Rule 24 from Defendant's Rule Book was not material and that the jury must disregard it.

9. Similar charge should have been made with reference to Rule 103 from said Rule Book.

10. The Court erred in charging that if the jury found for the plaintiff, it might, in assessing damages, consider the loss to the widow and child of the care, attention and society of plaintiff's decedent.

11. The Court erred in charging that if the jury found

for the plaintiff, it might, in assessing damages, consider the suffering and mental anguish of the widow and her minor child.

12. The Court erred in charging that if the jury found for the plaintiff, it might, in assessing damages, consider the pain and suffering of plaintiff's decedent.

PLAINTIFF'S EXHIBIT No. 3

Report of Accident resulting in
injury to persons, equipment or
roadbed.

(State Corporation Commission)

(April 24, 1940)

(Va.)

To the Honorable State Corporation Commission,

RICHMOND, VIRGINIA.

The Atlantic Coast Line Railroad Company makes the following

REPORT OF AN ACCIDENT

which occurred near Clopton, Virginia, Station on the 20th day of March, 1940, at 7:15 o'clock P. M.

Nature of Accident

Police Officer of the Railroad Company struck and partly passed over by freight car in yard.

Name of Each Person Injured and Nature and Extent of Injury.—J. L. Tiller, white, 52 years of age, Police Sergeant of the ACL RR Co., went with yard engine taking cut of cars to Clopton, Va., to be placed in freight train stepped

off engine upon arrival and was looking over the cars as they passed. He was standing on adjoining track for this purpose when road engine with several cars ahead of engine backed into this track. He was struck by the first car and dragged several feet receiving injuries which resulted in death in Grace Hospital, Richmond, Va., at 4:25 A. M., March 22nd, 1940.

Damage to Equipment

None

Damage to Roadbed

None

(Sign Here)

J. A. WALL

(Title)

Superintendent Transportation

To be forwarded to State Corporation Commission at end of calendar month, with abstract of all accident reports to that Department for such month.

COMMONWEALTH OF VIRGINIA

(Seal of Virginia)

DEPARTMENT OF THE

STATE CORPORATION COMMISSION

I, N. W. Atkinson, Clerk of the State Corporation Commission do hereby certify that the foregoing is a true copy of report filed by Atlantic Coast Line Railroad Company covering an accident on March 20, 1940, which resulted in the death of J. T. Tiller.

In Testimony Whereof I hereunto set my hand and affix the Official Seal of the State Corporation Commission, at Richmond, this 28th day of August, A.D. 1941

(Seal of State Corporation Commission)

(Sgd)

N. W. ATKINSON,

Clerk of the Commission.

MOTION OF DEFENDANT THAT THE VERDICT BE SET ASIDE AND THE JUDGMENT BE ENTERED IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT, AND IF THIS MOTION IS NOT GRANTED, THE MOTION OF DEFENDANT FOR A NEW TRIAL.

(Filed September 8, 1943)

Defendant moves that the verdict of the jury be set aside and that judgment, notwithstanding the verdict, be entered for Defendant in accordance with its motion for a directed verdict made at the conclusion of Plaintiff's evidence and renewed at the conclusion of all the evidence, and assigns as the ground of its motion the following:

There was no evidence before the jury from which it could be concluded that the Defendant was guilty of any actionable negligence; there was no evidence before the jury from which it could be concluded that the Defendant violated the Boiler Inspection Act or the Rules and Regulations of the Interstate Commerce Commission, made pursuant thereto; there was no evidence before the jury from which it could have been found that negligence of the Defendant, if any, or violation of said Rules and Regulations, if any, was the proximate cause of the injuries and death of plaintiff's decedent. The verdict of the jury is, of necessity, based solely on speculation and conjecture.

In the event the foregoing motion should be overruled, then Defendant moves that said verdict be set aside and that a new trial be granted, and assigns as the grounds of its motion the following:

1. The Court erred in permitting the Plaintiff to file an amended complaint raising for the first time the question of a violation of the Federal Boiler Inspection Act and the Rules and Regulations promulgated pursuant thereto, more than three years after the cause of action had accrued and, in overruling Defendant's motion that the allegations re-

lating to these matters be stricken from the amended complaint.

2. The Court erred in admitting into the evidence, over Defendant's objection, the report made to the State Corporation Commission of Virginia, and which report was permitted to be filed as one of Plaintiff's exhibits.

3. The Court erred in overruling the motion of Defendant that said report be stricken from the evidence.

4. The Court erred in overruling the motion of Defendant that Rule 24 from Defendant's Rule Book, issued to Defendant's employees be stricken from the evidence.

5. The Court erred in overruling the motion of Defendant that Rule 103 from Defendant's Rule Book issued to Defendant's employees be stricken from the evidence.

6. The Court erred in its charge to the jury in the particulars set forth in Defendant's objection to that charge.

7. The verdict of the jury is against the weight of the evidence.

8. The verdict of the jury is without evidence to support it and contrary to the evidence.

MOTION

(Filed September 24, 1943)

Comes now the plaintiff in this action, by her counsel, and moves the court to strike from the exceptions filed by the defendant to the instructions given to the jury, paragraphs 10, 11 and 12 thereof, the grounds for said motion being that the defendant did not object to the giving of that portion of the Court's instruction or charge which related to the ascertainment of damages before the jury retired to consider its verdict.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA

AT RICHMOND

HATTIE MAE TILLER, Executor
of the Estate of JOHN LEWIS

TILLER, deceased,

Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD
COMPANY, a Virginia corporation,

Defendant.

CIVIL ACTION
FILE NO. 129

ORDER OVERRULING MOTION AND ENTERING
JUDGMENT

(Entered and Filed November 10, 1943)

This cause came on this day to be heard on plaintiff's motion to strike paragraphs 10, 11 and 12 from the objections to the charge of the Court to the jury filed by the defendant and on the motion of the defendant that the verdict of the jury be set aside and that judgment be entered in accordance with the defendant's motion for a directed verdict and the motion of defendant for a new trial.

Upon consideration whereof, it is ordered that the said motion of the plaintiff be granted and that paragraphs 10, 11 and 12 be, and the same hereby are, stricken from the objections to the charge of the court to the jury filed by the defendant, and that the said motion of the defendant to set aside the verdict of the jury and enter judgment in accordance with defendant's motion for a directed verdict and its said motion for a new trial be, and the same hereby are, overruled.

It is further ordered that plaintiff recover of defendant the sum of \$22,500.00, with interest at the rate of 6% per annum from the 3rd day of September, 1943, together with her costs in this behalf expended.

The defendant having announced its intention to take an

appeal from the said judgment of the Court, it is ordered that the execution of and any proceedings to enforce this judgment be, and the same hereby are, stayed pending appeal upon the defendant executing within the period of 20 days from the date hereof a supersedeas bond in the sum of \$25,000.00, conditioned and payable as the law directs and with surety to be approved by this Court.

November 10, 1943.

ROBT. N. POLLARD,
United States District Judge.

[fol. 199] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

No. 5217

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellant,

VERSUS

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

January 3, 1944, the transcript of the record is filed and the cause docketed.

Same day, original exhibit (aerial map) is certified up.

January 4, 1944, the appearance of J. M. Townsend is entered for the appellant.

Same day, the appearance of J. Vaughan Gary and Dave E. Satterfield, Jr., is entered for the appellee.

January 5, 1944, the appearance of Collins Denny, Jr., is entered for the appellant.

February 2, 1944, statement under section 3 of rule 10 is filed.

Same day, stipulation as to joint appendix is filed.

[fol. 200] March 6, 1944, petition of appellant for leave to file brief in excess of fifty printed pages is filed.

ORDER GRANTING LEAVE TO FILE BRIEF IN EXCESS OF FIFTY
PAGES--Filed March 8, 1944

(Style of Court and Title Omitted)

Upon the petition of the appellant, and for good cause shown,

Special Leave is hereby granted appellant to file brief in excess of fifty pages, but not exceeding eighty-five printed pages, in the above entitled case.

March 7th, 1944.

John J. Parker, Senior Circuit Judge.

March 18, 1944, brief on behalf of the appellant is filed.

Same day, joint appendix to briefs of the parties is filed.

April 4, 1944, brief on behalf of the appellee is filed.

ARGUMENT OF CAUSE

April 17, 1944 (April term, 1944) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Same day, original exhibit (flashlight) is sent up.

[fol. 201] OPINION—Filed May 15, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5217

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellant,

VERSUS

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued April 17, 1944. Decided May 15, 1944)

Before Parker, Soper and Dobie, Circuit Judges

Collins Denny, Jr., (J. M. Townsend on Brief) for Appellant, and J. Vaughan Gary (Dave E. Satterfield, Jr., on Brief) for Appellee

[fol. 202] SOPER, Circuit Judge:

This case, now before us for the second time, relates to the accidental death of John Lewis Tiller, a sergeant of railroad police, while engaged in the performance of his duties in the Clopton freight yard of the Atlantic Coast Line Railroad Company near Richmond. In our former opinion (128 F. 2d 420) we affirmed the action of the District Court at the first trial in directing a verdict for the defendant carrier on the ground that the evidence disclosed no negligence on its part. We recognized that the common law defense of assumption of the risk was eliminated in cases under the Federal Employers Liability Act when §4 of the Act was amended in 1939, 45 U. S. C. A. 54, so as to

provide that in any action brought under the Act to recover against a carrier for the injury or death of an employee of the carrier, such employee shall not be held to have assumed the risk of his employment where his injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of the carrier. But we concluded that no recovery from the carrier could be had because the evidence did not indicate any negligence on its part but rather that the accident resulted from the negligence of the deceased or from his exposure to the risks which are inherent in the business of railroading notwithstanding the performance by the carrier of its duty to its men. In so doing we interpreted the amended statute to mean that while an employee of a carrier does not assume the risk of his employment in any case where injury or death results from the carrier's negligence, he does assume the risk of injury which results not from his employer's negligence but from the intrinsic nature of his dangerous occupation.

No one saw the accident but the evidence at the first trial warranted the inference that the accident occurred under [fol. 203] the following circumstances: Every evening the carrier operated a freight train from Richmond to the South which was made up at the Clopton Yard. Tiller had been a member of the Railroad Police Force for sixteen years and for a number of years had been assigned to the protection of this train. He was engaged in this work about 7 P. M. on March 20, 1940, when he was hit by the head car of three cars that were being pushed in a northerly direction by the road engine in a slow back-up movement in the course of the shifting operations. The tracks ran north and south at the point of the accident and Tiller was standing between two of the tracks or on the more westerly of the two tracks, while using a flashlight to examine the seals on the doors of the cars on the track to the east without observing that the three cars in the back-up movement were approaching him on the track to the west. The night was dark and the yard was unlighted. There was no light on the head car of the back-up movement except that a brakeman holding a lighted lantern was riding on the step at the northwest corner of the car in order to protect a cross highway known as Clopton Road which the cars were about to cross. The bell of the engine was ringing.

The shifting of cars in the freight yard was a necessary and customary operation in the make up of the train; and

the carrier's employees had been instructed that they must watch out for the movement of the trains as no employee watches out for them and no lights are used at night on the head end of back-up movements except when an employee is placed at the back end with a lantern to protect a road crossing. In regard to this practice it was expressly stipulated at the second trial in the District Court, now under review, that both in their large and most active yards and in their smaller and less active yards railroads make it a practice not only to pull cars with the locomotive in the lead position but also to push cars with the locomotive in the rear [fol. 204] position of the movement. When cars are thus pushed it is not the practice of railroads to place on the lead end of the movement a headlight similar to that carried by a locomotive or otherwise to light the lead end of the back end movement. Sometimes for a special purpose a man carrying a lantern may ride on the lead end of the movement. Cars are not only pushed with the engine running forward but also with the engine running in reverse.

Upon our affirmance of the judgment of the District Court at the first trial, the Supreme Court granted certiorari and reversed, *Tiller v. Atlantic Coast Line*, 318 U. S. 54. The court made it clear (p. 58) that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to non-negligence"; and the court held (p. 68) without specifying the particulars wherein the defendant had failed to perform its duty, that upon the facts recited "the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury."

Since the evidence at the second trial in respect to the movement of the cars was substantially the same as at the first, this decision required the District Judge notwithstanding the opposition of the defendant to submit the case to the jury. Our duty upon this appeal to affirm the judgment of \$22,500 for the plaintiff based upon the verdict would have been equally clear if the plaintiff had been content at the second trial to rest upon the legal theory outlined in the opinion of the Supreme Court; but the plaintiff amended the complaint by specifying a new item of negligence which was [fol. 205] submitted to the jury as an alternative ground for

recovery. Since the verdict for the plaintiff was general and did not specify the ground on which it rested, it becomes necessary for us to determine whether there was sufficient evidence to justify the submission of this new theory to the jury over the defendant's objection.

The plaintiff was permitted to amend the complaint at the second trial so as to add the allegation that the carrier had violated the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A. §§ 22 to 34, by using a locomotive which was in improper condition and unsafe to operate in that it did not have proper lights between sunset and sunrise, as prescribed by the rules of the Interstate Commerce Commission promulgated pursuant to the statutes. One of these rules makes the following provision:

"131. Locomotives used in Yard Service.—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The road engine that was pushing the cars that injured Tiller did not have such a light on its rear end as is described in the rule but only a small electric bulb situated on the top of the tender below the top of the cars that were being pushed.

The defendant objected to the allowance of the amendment on the ground that it did not charge an act of common law negligence but the violation of a statutory duty and therefore set up a new cause of action which was barred by the expiration of three years period of limitations imposed by the Federal Employers' Liability Act. We do not need to consider this question in the view we take of the subsequent [fol. 206] developments of the case. At the conclusion of the evidence the court charged the jury that the defendant owed to Tiller the general duties to exercise ordinary care to furnish its employees a reasonably safe place of work and to give adequate warning of any unusual or unexpected movement in making up its trains, and that if the jury believed from the evidence that the defendant failed to per-

form either of these duties and as the proximate result of such failure Tiller received the injuries from which he died, then the verdict should be for the plaintiff.

In addition the court charged the jury that it was the duty of the defendant to obey the rules promulgated by the Interstate Commerce Commission pursuant to the Federal Boilers Inspection Act; and that if the road engine of the defendant was being used at the time of the injury to classify the cars and make up a train, it was being used in yard service within the meaning of the rule, and if the jury believed from the evidence that Tiller was struck by a car pushed in yard service by a locomotive that did not have a rear light, as prescribed by the rule, and as a proximate result of this failure Tiller received fatal injuries, the verdict of the jury should be for the plaintiff.

At the end of the plaintiff's case and at the end of the whole case, the defendant moved for a directed verdict upon the specific grounds, amongst others, that the evidence disclosed no violation of the Boiler Inspection Act or of the rules promulgated thereunder because the locomotive in question was not being used in yard service at the time of the accident; and also upon the ground that even if the locomotive was then being used in violation of the rule there was no evidence to show that the violation was the proximate cause of the accident. The defendant also moved to strike out the amendment of the complaint and the evidence in respect to the Boiler Inspection Act. All these motions [fol. 207] were overruled and the correctness of the charge on this aspect of the case must therefore be considered.

We shall assume that the locomotive, although a road engine, was being used in yard service when, in order to make up the train, it was shifting certain cars while the yard engine was shifting others; but it is still necessary to determine whether the absence of a rear light on the tender of the road engine had any bearing on the accident. The evidence showed that if the tender of the road engine had been equipped with a rear searchlight, it would not have shone out so as to enable a person in the cab to see a dark object on or near the track 300 feet ahead in the direction of the backward movement, as contemplated by the rule. Nor would the light have been visible to one standing at or near the track ahead of the movement. The light would have been obscured by the cars which the engine was pushing because the car next to the tender was higher than a

searchlight mounted on top of the tender would have been. Such a light would have shone against the end of the adjacent car and would have been diffused at that point and would not have illuminated the area ahead of the cars.

The plaintiff contends that it would be a violation of Rule 131 for a carrier to permit the headlight of an engine in yard service to be obscured by cars that it is pushing, but this is tantamount to saying that an engine may not push cars in yard service at night unless the head car of the movement is lighted. The evidence shows that the practice of carriers is to the contrary and that no rule forbids it. It follows that even if it be held that the carrier violated Rule 131 on this occasion, the violation had no connection with the accident.

The Supreme Court said in the pending case and reiterated more recently in *Tennant v. Peoria etc. R. Co.*, 321 U. S. 29, that in order for an employee to recover under the Federal Employers' Liability Act for injuries suffered, he must prove not only that the carrier was negligent but also that [fol. 208] its negligence was the proximate cause of the accident in whole or in part. The plaintiff failed to meet this test insofar as the alleged violation of the Boiler Inspection Act was concerned, and on this account we think that the District Court should have withdrawn this issue from the jury's consideration. The case was submitted on two theories; one of general negligence and one of special negligence growing out of the alleged violation of the statutory rule. Under the decision of the Supreme Court there was substantial evidence to justify the submission of the first question to the jury and to support a verdict in the plaintiff's favor thereon. But in the consideration of this question the defendant was entitled to go to the jury without the stigma that its conduct was forbidden by a rule devised by governmental authority for the safety of railroad employees, and the submission of the second question was prejudicial to the defendant's case.

Furthermore, since the verdict was general, it is impossible to say whether it was based upon the issue that was properly submitted to the jury or upon the issue that should have been withdrawn. The rule to be applied in such a situation is stated in *Stokes v. United States*, 8 Cir., 264 F. 18, 23, as follows:

“* * * A general verdict under an erroneous instruction cannot be upheld, when there were two theories sub-

mitted to the jury, on either of which they might have founded it, under one of which the instruction was harmless, while under the other it was error, because the generality of the verdict renders it impossible to determine upon which theory the jury based it. They may have founded it upon the very issue to which the erroneous instruction related, and that instruction may have controlled and produced their finding. *State of Maryland v. Baldwin*, 112 U. S. 490, 493, 5 Sup. Ct. 278, 28 L. Ed. 822; *Lyon, Potter & Co. v. First Nat. Bank of Sioux City*, 85 Fed. 120, 123, 29 C. C. A. 45, 48; *Durant Mining Co. v. Percy Consolidated Mining Co.*, 93 [fol. 209] F. 166, 169, 35 C. C. A. 252, 255; *St. Louis Iron Mtn. & Southern Ry. Co. v. Needham*, 63 F. 107, 114, 11 C. C. A. 56, 62, 25 L. R. A. 853; *What Cheer Coal Co. v. Johnson*, 56 F. 810, 813, 6 C. C. A. 148, 151; *Creswell Ranch & Cattle Co. v. Martin*, 63 F. 84, 90, 11 C. C. A. 33, 39."

See also *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60.

Certain remaining questions must be considered as they may arise again on a retrial of the case. The first relates to the admissibility of a report of the accident made by the carrier's superintendent of transportation to the State Corporation Commission of Virginia pursuant to State statute, (Virginia Code §3988). Therein it was stated that Tiller stepped off a yard engine taking a cut of cars to Clopton Yard to be placed in a freight train and that he was standing on the adjacent track looking at the cars as they passed when he was hit by the head car of a back-up movement pushed by a road engine. The defendant brought out through the testimony of the superintendent and other employees that the report was not based upon their personal knowledge or upon information received from any eye witness of the accident but upon inferences drawn from what was known of Tiller's movements shortly before the accident, and the finding of his body entangled in the wheels of the head car and articles of his equipment nearby. Thus explained, the report added little or nothing to the facts in evidence.

The defendant contends, however, that the report although in the nature of an admission against interest should not have been received in evidence because the federal statute, 45 U. S. C. A. §§ 38 to 41, which requires carriers to make similar reports to the Interstate Commerce Commission expressly provides that the reports shall not be

admissible in evidence in any suit growing out of any matter mentioned therein. But this provision was omitted from [fol. 210] the Virginia enactment and does not restrict the use of the report to the State Commission; and we do not think that the Act of Congress passed under its power to regulate interstate commerce excludes the state body from the field. On the contrary, the federal statute expressly empowers the Interstate Commerce Commission to cooperate with a State Commission which is investigating an accident within its borders. There was no error in admitting the report in evidence.

In the next place the defendant contends that the court erred in that portion of its charge that related to the question whether the movement of the cars that struck Tiller was so unusual and unexpected that it became the duty of the defendant to give him an adequate warning of their approach. In substance, the court charged the jury that if they believed that the back-up movement was an unusual and unexpected one and a departure from the general practice in making up the particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of the movement and if the jury found that the defendant failed to perform this duty and as the result Tiller was injured, the jury should find a verdict for the plaintiff.

The evidence on the point is somewhat conflicting but there was substantial evidence to show that in making up the train in question the road engine does not usually back cars into the track on or near which Tiller was standing when he was hurt. On the other hand, there was no rule or custom which prohibited such a movement and the evidence showed that the same movement had been performed in the assembly of this nightly train on other occasions and that the track was in general use and was used for back-up movements for other purposes. Under these circumstances the railroad owed no duty to give a special warning to one [fols. 211-212] as familiar as Tiller with the local situation that the particular movement was about to take place. The instruction therefore should not have been given. The remainder of the charge sufficiently instructed the jury as to the duty of the carrier to look after the safety of its employees by exercising that degree of care which persons of

ordinary prudence engaged in the same business exercise under like circumstances.

Objections to actions of the court on other points were also made by the defendant but in our view they involve no error on the part of the court and do not require discussion at this time.

Reversed and Remanded.

[fol. 213] JUDGMENT—Filed and Entered May 15, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5217

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellant,

vs.

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Richmond, with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, [fol. 214] U. S. Circuit Judge.

June 13, 1944, petition of appellee for a stay of the mandate is filed.

ORDER STAYING MANDATE—Filed and Entered June 13, 1944

(Style of Court and Title Omitted)

Upon the Application of the Appellee, by her counsel, J. Vaughan Gary, Esq., and for good cause shown,

It is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date. June 13, 1944.

John J. Parker, Senior Circuit Judge.

STIPULATION AS TO RECORD FOR USE ON PETITION FOR A WRIT OF CERTIORARI—Filed July 7, 1944

(Style of Court and Title Omitted)

Subject to the approval of The Supreme Court of the United States, it is hereby stipulated and agreed by and between counsel for the parties hereto that both for the purpose of consideration of the petition for writ of certiorari and for the hearing in event the petition for writ of certiorari is granted, the certified transcript of the record and the printed record shall consist of the following:

[fol. 215] 1. The joint appendix to the briefs of Appellant and Appellee filed in the United States Circuit Court of Appeals for the Fourth Circuit in this action.

2. The proceedings in and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in this action.

3. This stipulation.

It is further stipulated and agreed that the original of plaintiff's Exhibit No. 2 shall be certified to The Supreme Court of the United States and filed in this case in that Court.

Dated at Richmond, Virginia, this 7th day of July, 1944.

Collins Denny, Jr. Counsel for Appellant. J.
Vaughan Gary, Counsel for Appellee.

[fol. 216]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the joint appendix to briefs of appellant and appellee and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on an application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 10th day of July, A. D., 1944.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

[fol. 217] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5529)

FILE COPY

CLERK'S OFFICE
U.S. SUPREME COURT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 335

**HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN
LEWIS TILLER, DECEASED,**

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

J. VAUGHAN GARY,

DAVE E. SATTERFIELD, JR.,

Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN
LEWIS TILLER, DECEASED,

vs.

Petitioner,

ATLANTIC COAST LINE RAILROAD COMPANY, A
CORPORATION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, deceased, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in this case on May 15, 1944.

A.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 15, 1944 (R. 208). The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A. Sec. 347 (a).

B.

Statement of the Matter Involved.

This case is now before this Court for the second time, having been previously heard in 1943 (*Tiller v. Atlantic Coast Line* (1943), 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610). It involves a suit for damages instituted under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, *et seq.*, by Hattie Mae Tiller, the widow and executrix of John Lewis Tiller, employed by Atlantic Coast Line Railroad Company as a sergeant of police, for his death while engaged in the performance of his duties in the Clopton freight yard of the company near Richmond, Virginia, which she alleges resulted from the negligence of the railroad company.

The Circuit Court of Appeals has found that the evidence warrants the inference that the accident occurred under the following circumstances: Every evening the carrier operated a freight train from Richmond to the South which was made up at Clopton Yard. Tiller had been a member of the Railroad Police Force for sixteen years and for a number of years had been assigned to the protection of this train. He was engaged in this work about 7 P. M. on March 20, 1940, when he was hit by the lead-car of three cars that were being pushed in a northerly direction by the road engine in a slow back-up movement in the course of shifting operations. The tracks ran north and south at the point of the accident and Tiller was standing between two of the tracks, or on the more westerly of the two tracks, while using a flashlight to examine the seals on the doors of the cars on the track to the east without observing that the three cars in the back-up

movement were approaching him on the track to the west. The night was dark and the yard was unlighted. The locomotive that was pushing the cars that injured Tiller had no light on its rear end other than a small electric bulb situated on the top of the tender below the top of the cars that were being pushed. There was no light on the head car of the back-up movement except that a brakeman holding a lighted lantern was riding on the step at the northwest corner of the car in order to protect a cross highway known as Clopton Road which the cars were about to cross. He stepped off the west side of the car before its east side struck Tiller.

When the case was first tried in the United States District Court, at the conclusion of plaintiff's evidence, the Court directed a verdict for the defendant. On appeal, the Circuit Court of Appeals for the Fourth Circuit affirmed the decision. This Court, on review, holding that the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury, reversed the decision of the Circuit Court of Appeals and remanded the case for further proceedings.

The original complaint filed by petitioner contained both general and specific allegations of negligence (R. 1). After the case was remanded to the District Court, the petitioner, with leave of court, filed (R. 5) an amended complaint (R. 7) amplifying the particulars of negligence contained in the original complaint by adding thereto an allegation that the defendant had violated the provisions of the Federal Boiler Inspection Act, 45 U. S. C. A., Sec. 22, *et seq.*, by using or permitting to be used a locomotive which was in improper condition and unsafe to operate in the service, and the condition of which constituted unnecessary peril to life and limb, in that it did not have the proper lights, and that defendant had also violated the rules and regulations prescribed by the Interstate Commerce Commission pursuant

to the provisions of the said Boiler Inspection Act, in that it used a locomotive in yard service between sunset and sunrise which did not have the proper lights as prescribed by the said rules.

The case was tried in the District Court on the amended complaint. The evidence introduced at this second trial in the District Court, insofar as it pertained to the allegations of negligence contained in the original complaint, was practically identical with that introduced at the first trial. The evidence presented at the former trial tending to show that the train which struck Tiller was engaged in an unusual and unexpected movement which entitled him to adequate warning thereof, was tremendously strengthened by the presentation of testimony from additional qualified witnesses who did not testify at the first trial. In addition, the petitioner proved that the defendant had violated Rule 131 of the Interstate Commerce Commission promulgated pursuant to the provisions of the Federal Boiler Inspection Act, in that the locomotive which caused the death of Tiller was a locomotive used in yard service between sunset and sunrise and that it did not have a light on its rear end which would enable a person in its cab who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 300 feet ahead and in front of such light, as prescribed by the said rule. The case was submitted to the jury by the District Court on the question of negligence on the part of the railroad and on the part of the employee, as prescribed by this Court (R. 180). The jury returned a verdict in favor of the plaintiff (R. 191). The court overruled a motion of the defendant to set aside the verdict and entered judgment for the plaintiff.

On appeal, the Circuit Court of Appeals for the Fourth Circuit reversed the decision of the District Court and ordered the case remanded for a new trial on the ground that

defendant's violation of Rule 131 of the Interstate Commerce Commission had no causal connection with Tiller's death, because even if the locomotive in question had been equipped with a light as required by the Rule, the light would have been obscured by the cars which the locomotive was pushing and would not have prevented the accident and that, therefore, this issue should have been withdrawn from the jury. The court held that, although the evidence at the second trial in respect to the movement of the cars was substantially the same as at the first, it was not bound by the former decision of this Court because the plaintiff had specified the violation of Rule 131 as a new item of negligence, which was submitted to the jury as an alternative ground for recovery, and that, since the verdict was general, it was impossible to say whether it was based upon the issue properly submitted to the jury or upon the issue that should have been withdrawn.

The court further held that, although there was substantial evidence to show that the train which caused the death of Tiller was engaged in an unusual and unexpected movement, under the circumstances involved the railroad owed no duty to give a special warning to him.

C.

Questions Presented.

1. Whether a general verdict should be upheld in a case involving two or more issues or theories, when one issue or theory has been properly submitted to the jury and is sustained by the evidence.

2. Whether a railroad, by adopting a certain practice in operating its trains, can nullify a rule of the Interstate Commerce Commission promulgated under the provisions of the Federal Boiler Inspection Act for the safety of the employees of the railroad.

3. Whether there was sufficient evidence to justify the submission of the question of the violation of Rule 131 of the Interstate Commerce Commission to the jury over the defendant's objection.

4. Whether there was sufficient evidence of a causal connection between defendant's violation of Rule 131 of the Interstate Commerce Commission and Tiller's death to justify submission of that question to the jury over defendant's objection.

5. Whether the question as to defendant's duty to give Tiller adequate warning because of the unusual and unexpected movement of the cars that struck him was properly submitted to the jury.

D.

Reasons Relied On for Allowance of Writ.

1. The United States Circuit Court of Appeals for the Fourth Circuit has decided an important question of Federal Law which has not been, but should be, settled by this Court, and has decided the same in a way probably in conflict with applicable decisions of this Court, namely, that a railroad, by adopting certain practices, may nullify a rule of the Interstate Commerce Commission promulgated pursuant to the provisions of the Federal Boiler Inspection Act for the protection of the employees of the railroad.

2. The United States Circuit Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, namely, that a general verdict cannot be upheld in a case in which there are two or more issues or theories when one issue or theory has been properly submitted to the jury and is sustained by the evidence if, in the opinion of the

court, another issue or theory has been improperly submitted to the jury and should have been withdrawn.

3. Petitioner, whose husband has suffered death from the negligence of the defendant, has pursued her quest for damages, to which she and her son are entitled under the Federal Employers' Liability Act, for nearly five years, through two jury trials and three appellate trials. A jury to whom her case was fairly and properly submitted in accordance with the decision of this Court has returned a verdict in her favor, to which she is justly entitled. If the decree of the Circuit Court of Appeals is permitted to stand, she will be forced into a third jury trial in which the issue will be improperly restricted and in which she will be at a decided disadvantage.

A supporting brief accompanies this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Fourth Circuit entered by that court in this case on May 15, 1944, and that the said order be reversed by this Honorable Court, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

J. VAUGHAN GARY,

DAVE E. SATTERFIELD, JR.,

Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF
JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

I.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals, Fourth Circuit (R. 200), is reported in 142 F. (2d) 718. The District Court of the United States for the Eastern District of Virginia did not deliver a written opinion. A memorandum opinion of the court on the question of the amendment of the complaint appears on page 13 of the Record and its final judgment on page 197.

II.

Jurisdiction.

The jurisdiction of this case is invoked under Sec. 240 (a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347 (a). The judgment of the United States Circuit Court of Appeals, Fourth Circuit, to be reviewed was entered on May 15, 1944 (R. 208).

III.

Statement of the Case.

A statement of the case appears under heading "B" of the Petition for Writ of Certiorari. In the interest of brevity, that statement is not now repeated, but is referred to, with the request that it be considered as here incorporated by reference.

IV.

Questions Presented.

The questions specifically brought forward by the Petition for Writ of Certiorari appear under heading "C" of the petition. Again, in the interest of brevity, they are not now repeated, but are referred to, with the request that they be considered as here incorporated by reference.

V.

ARGUMENT.**Summary of Argument.**

1. This Court has held that the evidence in this case is sufficient to support the verdict of the jury on one issue which was properly submitted. The verdict should, therefore, be upheld, even though another issue may have been improperly submitted.

2. The issue relating to plaintiff's right of recovery because of defendant's violation of Rule 131 of the Interstate Commerce Commission was properly submitted to the jury and there is sufficient evidence to sustain a verdict founded thereon.

3. The District Court properly instructed the jury in that portion of its charge that related to the question whether the movement of the cars that struck Tiller was so unusual and unexpected that it became the duty of the defendant to give him an adequate warning of their approach and there is sufficient evidence to sustain a verdict founded thereon.

1. The verdict of the jury should be upheld on issue properly submitted.

This Court held in *Tiller v. Atlantic Coast Line* (1943), 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, that the evidence presented during the first trial of this case was sufficient to sustain a verdict of negligence against the defendant, and that the question of negligence should, therefore, have been submitted to the jury. There was practically no change in the evidence presented during the second trial in the District Court on the original allegations of negligence. It is rather remarkable that in these uncertain times it was possible to assemble for the second trial the same witnesses who testified at the previous trial two years earlier and that their testimony varied so little after the expiration of two years.

The Circuit Court of Appeals concedes that the issue raised by this evidence was properly submitted to the jury and admits, although somewhat reluctantly, that had no other issue been raised, its duty to affirm the judgment, based upon the verdict, would have been clear under the previous decision of this Court. It holds, however, that

because the petitioner in the second trial alleged and proved, as an additional act of negligence, that the defendant violated the Federal Boiler Inspection Act and Rule 131 of the Interstate Commerce Commission promulgated pursuant thereto and, in the court's opinion, there was no causal connection between the violation of the rule and the death of Tiller, this issue was improperly submitted to the jury and the general verdict could not be upheld, as it was impossible to say whether it was based upon the issue properly submitted or upon the issue that should have been withdrawn. Authorities are cited to sustain this opinion.

It is respectfully submitted, however, that there is a decided conflict of authority upon the question as to whether error affecting only one of two or more issues is prejudicial. This Court in recent cases has apparently given tacit approval to the doctrine that if one issue is properly submitted to the jury and is sustained by the evidence, a general verdict should be upheld even though another issue may be improperly submitted. *Cross v. Ryan* (C. C. A. 7th, 1941), 124 F. (2d) 883, certiorari denied (1942), 316 U. S. 682, 62 S. Ct. 1269, 86 L. Ed. 1755; *Miller v. Advance Transp. Co.* (C. C. A. 7th, 1942), 126 F. (2d) 442, certiorari denied (1942), 317 U. S. 641, 63 S. Ct. 32, 87 L. Ed. 516.

Applying this rule to the instant case, if, as determined by this Court at the previous hearing, the evidence then presented was sufficient to justify the submission of the question of negligence to the jury on the issue presented by petitioner's original allegations, then the evidence is now sufficient to sustain the verdict of the jury on that issue which was properly submitted. The verdict should, therefore, be upheld, even though, as determined by the Circuit Court of Appeals, the other issue may have been improperly submitted.

2. Issue involving defendant's violation of Rule 131 was properly submitted to jury.

The Federal Boiler Inspection Act, 45 U. S. C. A., Sec. 22, et seq., was enacted according to its title "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." Section 2 of the said Act, 45 U. S. C. A., Sec. 23, reads as follows:

"Use of unsafe locomotives and appurtenances unlawful; inspection and tests.—It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The said law authorizes the Interstate Commerce Commission to prescribe rules and regulations governing locomotives, their equipment, boilers and appurtenances thereto.

In the case of *U. S. v. B. & O. Ry. Co.* (1935), 293 U. S. 454, 55 S. Ct. 268, Mr. Justice Brandeis, delivering the opinion of the Court, says on page 271:

"* * * Referring to the argument of the states 'that the authority delegated to the Commission does not extend to ordering the use or installation of equipment of any kind, *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419,' we said: 'The duty of the Commission is not merely to inspect.

It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.' In closing the opinion, we added: 'If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample.'"

Pursuant to the provisions of the said law, the Interstate Commerce Commission has promulgated and published certain rules and instructions for the inspection and testing of steam locomotives and tenders and their appurtenances. Rule 131, prescribed by the Commission, which was in full force and effect at the time of employee Tiller's death, reads as follows:

"131. *Locomotives used in yard service.*—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The rule of the Commission has the force and effect of a statutory provision and imposes upon the respondent a mandatory, absolute, unqualified and continuing duty to comply with its requirements. *Southern Ry. Co. v. Lunsford* (1936), 297 U. S. 398, 56 S. Ct. 504; *Napier v. Atlantic Coast Line* (1926), 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; *B. & O. Ry. Co. v. Groeger* (1925), 266 U. S.

521, 45 S. Ct. 169; *Chesapeake & O. Ry. Co. v. Wood* (1932), 59 F. (2d) 1017.

The District Court instructed the jury that if it believed from the evidence that Tiller was struck, between sunset and sunrise, by a car which was being pushed by a locomotive being at the time used in yard service without a rear light as prescribed by Rule 131, and as a proximate result of such failure to have such a light on the rear of the locomotive Tiller received injuries from which he died, then it should return a verdict for the plaintiff. It is respectfully submitted that this was a correct statement of the law and that there is sufficient evidence to sustain the finding on that issue.

The Circuit Court of Appeals apparently concedes that Rule 131 was violated by the defendant, but bases its reversal of the case on the ground that there was no causal connection between the violation of the rule and the accident. The evidence shows that the darkness was an important factor in this case. The night was dark, the yard was unlighted, the rear end of the back-up movement was unlighted. The jury might well have believed that if the locomotive had carried the proper light, even though the light would have been obstructed by the cars which it was pushing, its beams would have been so diffused as to have attracted Tiller's attention, and that his death might have been averted.

It is indisputable that if the locomotive had been equipped with a rear light, as prescribed by Rule 131, and that light had not been obstructed by the cars placed in front of it, anyone maintaining a lookout in the cab of the locomotive could have seen Tiller and Tiller would certainly have seen the light and so his death would have been averted.

The Circuit Court of Appeals held that defendant's violation of Rule 131 was not the proximate cause of Tiller's death because, even if the locomotive had been equipped

with the proper light, it would have been obscured by the cars which it was pushing and would not have prevented the accident. This ruling rests upon the false premise that defendant had a right to obscure the light with cars. Rule 131 is a safety measure. The purpose of the light is to prevent accidents by disclosing objects on the track and by serving as a warning to persons in danger of the approaching locomotive. By what authority can the railroad so obscure the light as to totally nullify the purposes of the rule?

It has been held that even if an engine in yard service was equipped with lamps on the front and rear in good condition in compliance with the Boiler Inspection Act, failure of the railroad's servants to keep the lamp burning as the engine proceeded at night constituted negligence rendering the railroad liable for resulting injury sustained by a switchman. *Chesapeake & O. Ry. Co. v. Rich* (C. C. A. 6th, 1936), 81 F. (2d) 584, certiorari denied (1936), 56 S. Ct. 955, 298 U. S. 684, 80 L. Ed. 1404.

A practice of carriers to permit the headlight of a locomotive in yard service to be obscured by cars that it is pushing, according to the opinion of the Circuit Court of Appeals, provides the defendant with an excuse for non-compliance with the rule. This practice is set forth in a stipulation of counsel presented at the second trial in the District Court (R. 148), in which it was agreed that if officials of five railroads operating in and out of Richmond, who are familiar with the practices on their roads and generally prevailing throughout the southeast had been present, they would have testified as to the existence of certain practices on the part of the railroads. Counsel for the petitioner did not agree that these were proper practices and they certainly did not dream that the court would adjudge them paramount to Federal Statutes.

In fact, the defendant apparently has a very unsatisfactory record with respect to its practices. The Interstate Commerce Commission published on October 12, 1942, a Report on Reliability of Railroad Employee Accident Statistics based on an investigation conducted about the time of this accident, in which certain policies, practices and methods of the defendant company are specifically and strongly condemned. The report also discloses that the files of some of the railroads, among which defendant is inferentially included, were practically barren of anything related to accident prevention, and concludes that if such companies had devoted to accident prevention an amount of effort equal to that expended by them in finding some means by which a report of a particular accident could be avoided, such effort "might have led to the saving of many lives, as well as avoidance of injuries."

The Circuit Court of Appeals holds, in effect, that this practice of carriers to permit the headlight of a locomotive in yard service to be obscured by cars which it is pushing can nullify a rule of the Interstate Commerce Commission promulgated for the safety of the carriers' employees. If the carriers, by establishing this practice, can nullify the rule with respect to lights on locomotives, they can, by establishing other practices, nullify all safety rules. It is respectfully submitted that under the law railroads must conform their practices to Federal Statutes and rules promulgated pursuant thereto.

In the instant case the rule of the Interstate Commerce Commission said "let there be light"; the evidence shows that there was no light and that, largely because of the absence of light, Tiller was killed. These uncontroverted facts are sufficient to sustain the verdict on this issue.

3. There was no error in that portion of the District Court's charge relating to the unusual and unexpected movement of the cars that struck Tiller.

The Circuit Court of Appeals held that there was substantial evidence to support petitioner's contention that the cars which struck Tiller were being employed in an unusual and unexpected movement at the time of the accident. The District Court charged the jury, in substance, that if they believed that the back-up movement was an unusual and unexpected one and a departure from the general practice in making up the particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of the movement and if the jury found that the defendant failed to perform this duty and as a proximate result of such failure Tiller was injured, the jury should find a verdict for the plaintiff. It is respectfully submitted that this was a correct statement of the law. *Toledo, St. L. & W. R. Co. v. Allen* (1928), 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Chesapeake & O. Ry. v. Peyton* (C. C. A. 4th, 1918), 253 F. 734.

The Circuit Court of Appeals determined that because there was no rule or custom which prohibited such a movement and the evidence showed that the same movement had been performed in the assembly of this nightly train on other occasions and that the track was in general use and was used for back-up movements for other purposes, the railroad owed no duty to give a special warning to Tiller and the District Court's instruction should not have been given. A careful reading of the record will show that the evidence as to previous similar movements, the general use of the track which was a siding and its use for back-up movements for other purposes was negligible.

Moreover, while evidence of this nature might be used to controvert the contention that the movement was unusual and unexpected, it would not change the defendant's duty to give adequate warning if the fact of the unusual and unexpected movement is proven as in this case.

Nor does the defendant's duty to give adequate warning of an unusual and unexpected movement depend upon a rule or custom prohibiting the movement. It rests upon a well-recognized principle of substantive law. The Circuit Court of Appeals has evidently confused the unusual movement doctrine with the doctrine which involves the violation of a rule, regulation or custom established by the employer.

The doctrine involving the unusual movement of trains in railroad yards is based upon the theory that, although a regular employee in the yards is presumed to have knowledge of the usual and ordinary movements of trains and, therefore, prior to the previous decision of this Court in this case, assumed the risk of such movements, even if negligently performed, when he was exposed to unusual danger by reason of an unusual or unexpected movement or a departure from the practice generally followed, the risk was not assumed and an obligation rested upon the employer to give him warning. Neither *Toledo v. Allen*, *supra*, *Chesapeake & O. Ry. v. Peyton*, *supra*, nor any other decisions dealing with this principle suggests that the evidence must show the violation of a rule or custom as a prerequisite to recovery. It is respectfully submitted that there was no error in the submission of this issue.

Conclusion.

In conclusion, counsel for the petitioner respectfully submit that, for the reasons herein set forth, a writ of certiorari should be granted the petitioner, and that this

Court should review and reverse the decision of the United States Circuit Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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(3264)



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Supreme Court of the United States

OCTOBER TERM 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE
ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD
COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

J. VAUGHAN GARY

DAVE E. SATTERFIELD, JR.

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OCTOBER TERM 1944

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Petitioner;

v.

ATLANTIC COAST LINE RAILROAD
COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

The respondent has presented numerous questions in its brief that were not raised in the petition for certiorari and were not discussed in petitioner's supporting brief which she adopted as her brief on the merits of the case. This reply will be limited to such questions and no effort will be made to rehash arguments heretofore submitted. The general arrangement of respondent's brief will be followed herein.

STATEMENT OF THE CASE

It does not appear necessary to restate the case or to review the facts. The facts have been stated twice by the United States Circuit Court of Appeals, Fourth Circuit,

in 128 F. (2d) 420 and 142 F. (2d) 718, and also by this Court in *Tiller v. A. C. L. R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 44, 143 A. L. R. 967. The facts have not changed and the Court now has before it substantially the same evidence as that on which its former findings were based.

QUESTIONS INVOLVED

The sixteen questions listed on pages 21 and 22 of respondent's brief will not be again enumerated here, but they will be argued in the order in which they appear.

ARGUMENT

1. Court Properly Permitted Amendment of the Complaint.

Petitioner on the 1st day of June, 1943, filed, with leave of Court, her amended complaint in this action in which she alleged violation by the respondent of the Federal Boiler Inspection Act, 45 U. S. C. A., Section 22, *et seq.*, and the Rules and Regulations prescribed by the Interstate Commerce Commission pursuant thereto (R. 5-9).

No specific reference was made to the Boiler Inspection Act, nor to the said Rules and Regulations of the Interstate Commerce Commission, in the original complaint, and the first allegation of violation thereof was made in the brief filed on behalf of the petitioner at the former trial in this Court. The respondent opposed the amendment on the grounds that it sought to introduce new subject matter as a new cause of action, raised as a cause of action a new and different state of facts from those alleged in the original complaint, and sought a departure from law to law, all after the expiration of

the limitation period of three years prescribed by the Federal Employers' Liability Act. The Court, being of the opinion "that the ends of justice require that leave to file said amended complaint be given," entered its order directing that it be filed (R. 5).

It is well settled that in an action brought under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, *et seq.*, violations of the Federal Boiler Inspection Act and the Rules and Regulations of the Interstate Commerce Commission adopted pursuant thereto may be alleged as acts of negligence. *Baltimore & Ohio Railroad Co. v. Groeger, Admr.* (1925), 266 U. S. 521, 45 S. Ct. 169; *Lilly v. Grand Trunk Western R. Co.* (1943), 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411. The right to amend a complaint, after remand of a case on appeal to the District Court for further proceedings, for the purpose of presenting new issues not inconsistent with the appellate court's judgment is also well established. *Jones v. St. Paul Fire & Marine Ins. Co.* (C. C. A. 5th, 1939), 108 F. (2d) 123. The sole issue, therefore, is whether petitioner's amended complaint presented a new cause of action which is barred by the statute of limitations.

a. Petitioner's Amended Complaint Does Not Present a New Cause of Action.

Petitioner's original complaint (R. 1) alleged a cause of action under the Federal Employers' Liability Act arising from the death of petitioner's decedent resulting from certain injuries caused by the negligence of the respondent. It did not allege a violation of the Federal Boiler Inspection Act or the Rules and Regulations of the Interstate Commerce Commission as a specific act of negligence. The amended complaint (R. 7) alleges

a cause of action under the Federal Employers' Liability Act arising from the death of petitioner's decedent resulting from certain injuries caused by the negligence of the respondent and specifically alleges the violation of the Federal Boiler Inspection Act and the Rules and Regulations prescribed by the Interstate Commerce Commission pursuant thereto.

The Boiler Inspection Act was enacted and the Rules and Regulations of the Interstate Commerce Commission were promulgated for the safety and protection of railroad employees. They prohibit the use of unsafe locomotives and appurtenances, require the use on locomotives and tenders of certain safety devices, provide for certain inspections and tests, and prescribe certain penalties upon the companies for the violation of their provisions. They do not provide any civil relief to employees for injuries resulting from their violation. They prescribe no cause of action for the employee. Action for civil relief must be brought under the provisions of the Federal Employers' Liability Act. So far as the rights of the employee are concerned, the violation of the Boiler Inspection Act is merely an act of negligence, for which a cause of action lies under the Federal Employers' Liability Act. This is clearly stated in the case of *Baltimore & Ohio Railroad Co. v. Groeger, Adm.r.* (1925), 266 U. S. 521, 45 S. Ct. 169, at page 528, where the Court said:

“That act (the Boiler Inspection Act) was passed to promote the safety of employees and is to be read and applied with the Federal Employers' Liability Act. Under the latter, defendant is liable for any negligence chargeable to it which caused or contributed to cause decedent's death (Sec. 1); and he will not be held guilty of contributory negligence (Sec. 3) or to have assumed the risks of his employ-

ment (Sec. 4) if a violation of Section 2 of the Boiler Inspection Act contributed to cause his death."

Petitioner's amendment, therefore, does not allege a new cause of action or seek a departure from law to law. It merely expands or amplifies the original allegation of negligence by alleging an additional act of negligence in support of the cause of action originally asserted. *Seaboard Air Line Ry. v. Renn* (1916), 241 U. S. 290, 36 S. Ct. 567, 60 L. Ed. 1006. See also *Clinchfield R. Co. v. Dunn* (C. C. A. 6th, 1930), 40 F. (2d) 586, 587, certiorari denied, (1930), 282 U. S. 860, 51 S. Ct. 34, 75 L. Ed. 761, where the Court said:

"Much latitude of amendment is properly allowed to save the cause of action, if possible, from the bar of limitations. This is especially so where, as here, there is reasonable ground for holding the amendment to be only an amplification and expansion of the cause of action, as the defendant itself must have always recognized it was intended to be prosecuted."

As a matter of fact, an amendment of petitioner's complaint was not necessary to inject the question of the violation of the Federal Boiler Inspection Act into this proceeding. Petitioner's original complaint alleged negligence on the part of the respondent, respondent's officers, agents and servants. The uncontroverted testimony in this case disclosed that there was no light on the rear of the engine pushing the cars which struck the petitioner's decedent. Petitioner contends that this was a violation of the Boiler Inspection Act and the Rules of the Interstate Commerce Commission adopted pursuant thereto. In view of this evidence, petitioner would have been entitled to an instruction based on the Boiler In-

spection Act and the Rules of the Interstate Commerce Commission regardless of the amendment. The amended complaint was filed so that the respondent would not be taken by surprise at the trial.

Even prior to the adoption of the Federal Rules of Civil Procedure, the courts followed a very liberal policy in allowing amendments to pleadings. In the language of Judge Parker in *United States v. Powell* (C. C. A. 4th, 1938), 93 F. (2d) 788, 790:

“The attitude of the Supreme Court on the question of permitting amendments of this character was well stated in the recent case of *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 68, 53 S. Ct. 278, 280, 77 L. Ed. 619, as follows: ‘It has fixed the limits of amendment with increasing liberality. A change of the legal theory of the action, “a departure from law to law”, has at times been offered as a test. *Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 295, 15 S. Ct. 877, 39 L. Ed. 983. Later decisions have made it clear that this test is no longer accepted as one of general validity. Thus, in *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, plaintiff suing in her individual capacity under a Kansas statute for her son’s death was allowed to amend to sue as administratrix under the Federal Employers’ Liability Act, 45 U. S. C. A. Sections 51-59, after the statute of limitations would have barred another action. In *New York Central & H. R. R. Co. v. Kinney*, 260 U. S. 340, 43 S. Ct. 122, 67 L. Ed. 294, there was in substance the same ruling. In *Friedrichsen v. Renard*, 247 U. S. 207, 38 S. Ct. 456, 62 L. Ed. 1075, a cause of action by a defrauded buyer to set aside a contract was turned into a cause of action to recover damages for deceit. “Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to

enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied." " "

In *Maty v. Grasselli Chemical Co.* (1938), 303 U. S. 197, 58 S. Ct. 507, plaintiff, who had alleged that he was injured while employed in the Silicate Department of his employer's chemical plant by inhaling gases or injurious substances, was permitted to amend his complaint after the period of limitation had run so as to allege that he was also employed in other departments of the employer's plant, particularly the Phosphate Department and Dorr Department. Delivering the unanimous opinion of the court, Mr. Justice Black said, at page 200:

"Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. The original complaint in this cause and the amended complaint were not based upon different causes of action. They referred to the same kind of employment, the same general place of employment, the same injury and the same negligence. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant. The New Jersey statute of limitations did not bar the amended cause of action."

b. The Amendment Relates Back to Date of Original Complaint.

The generous attitude of the courts in permitting amendments, which had been developed by numerous

decisions over a period of years was codified in Rule 15 (c) of the Federal Rules of Civil Procedure, which reads as follows:

“(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

The effect of this rule is well stated by Judge Underwood, of the District Court, S. D. Ohio, E. D., in *White v. Holland Furnace Co., Inc.* (1939), 31 F. Supp. 32, as follows:

“Plaintiff’s second claim is based upon the same facts set forth in the original petition, the only change being one of theory from contract to tort for conversion under the Michigan pledgor-pledgee statute. Before the Federal Rules the Supreme Court had allowed amendments to pleadings when the statute of limitation would otherwise have been a bar where the only change was ‘from law to law’. *United States v. Memphis Cotton Oil Co.*, 1933, 288 U. S. 62, 67, 53 S. Ct. 278, 280, 77 L. Ed. 619. See *Clinchfield R. Co. v. Dunn*, 6 Cir., 1930, 40 F. 2d 586, 74 A. L. R. 1276 certiorari denied, 1930, 282 U. S. 860, 51 S. Ct. 34, 75 L. Ed. 761. Under the present rules, unless there is a substantial change from the claim as originally alleged the amendment will relate back to the beginning of the action and is not barred by the statute of limitations. *Perry v. Southern Ry. Co.*, D. C. E. D. Tenn. Aug. 30, 1939, 29 F. Supp. 1006. * * * * *

* * * * *

“The general rule stated by the courts is that an amended petition will not relate back to the time of filing the original, thereby removing the bar of the

statute of limitations where the amendment states a new cause of action. *Missouri, K. & T. R. Co. v. Wulf*, 1913, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; *United States v. Memphis Cotton Oil Co.*, 1933, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619. This rule has been applied to deny amendments changing the action from one in contract to one in tort. *Haas Brothers v. Hamburg-Bremen Fire Ins. Co.*, 9 Cir., 1910, 181 F. 916; *Buerstetta v. Tecumseh Nat. Bank*, 1899, 57 Neb. 504, 77 N. W. 1094. The decisions since the new rules have not changed this general rule. They hold that an amended petition cannot introduce a new cause of action when the same is barred by the statute of limitations. *L. E. Whitham Const. Co. v. Remer*, 10 Cir., 1939, 105 F. 2d 371; *Ronald Press Company v. Shea*, D. C. S. D. N. Y. 1939, 27 F. Supp. 857. But the rule has been broadened by liberalizing the meaning of the term 'cause of action' by the courts and the new federal procedure.

"The emphasis of the courts has been shifted from a theory of law as the cause of action, to the specified conduct of the defendant upon which the plaintiff tries to enforce his claim. *New York Central R. R. v. Kinney*, 1922, 260 U. S. 340, 43 S. Ct. 122, 67 L. Ed. 294; *United States v. Memphis Cotton Oil Co.*, 1933, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619. The new rules have adopted the words 'claim' or 'claim for relief' in place of the term 'cause of action', which shows an attempt to avoid the concept of that term adopted by some courts prior to the rules.

"To give effect to Rule 15(c), 28 U. S. C. A. following section 723c, the Court should allow an amendment of a pleading where the factual situation was not changed though a different theory of recovery is presented. It provides that 'Whenever the claim * * * arose out of the conduct, transaction, or occurrence set forth * * * the amendment relates back to the date of the original pleading.' "

In the instant case the claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence set forth in the original complaint, and the amendment, under Rule 15(c), therefore, relates back to the date of the original complaint.

The Court's attention is particularly directed to the very able memorandum opinion of the District Court on this question (R. 13).

2. The Verdict of the Jury and Judgment of the District Court are Amply Supported by the Evidence and Should Be Upheld.

Respondent's questions numbered 2, 3, 4, 5 and 6 which its counsel discuss on pages 31 to 50, inclusive, of their brief are fully covered in petitioner's brief in support of her petition for certiorari at page 11, *et seq.*

3. The Report of the State Corporation Commission of Virginia was Properly Admitted as Evidence.

This report was made under oath by the superintendent of transportation of the respondent pursuant to the requirements of the applicable Virginia statute. It should be noted that the statement is an unequivocal one of fact; yet respondent takes the position that the manner in which the petitioner's decedent was injured is a matter of speculation and conjecture. Surely there could be no clearer illustration of an admission against interest which under settled principles of law may be offered in evidence; the respondent indeed does not dispute this proposition, but argues that since the report required by Act of Congress to the Interstate Commerce Commission is privileged by Federal statute, the trial court should have excluded that to the State Corporation Commission which is not privileged by either State or Federal statute.

The privilege granted for the Interstate Commerce

Commission report does not and cannot extend to the State Corporation Commission report which is a matter governed by the law of Virginia. The privilege is purely statutory in origin, and is confined to the express terms of the statute which creates it. *Wigmore on Evidence*, (3rd Ed.), Vol. VIII, Sec. 2377, p. 761.

Therefore, in the absence of an applicable statute privileging the report to the State of Virginia, it is admissible.

“In an action for injury by a railroad, ‘evidence of statements by the conductor and trainmaster as to the cause of the accident is admissible, where they were required by the railroad company to ascertain and report the cause of the accident for such declarations were within the scope of their duty, and being so they are declarations of the principal’.” *Chicago, St. P. M. & O. Ry. Co. v. Kulp*, 102 F. (2d) 352 (C. C. A. 8th, 1939), certiorari denied (1939), 307 U. S. 636, 59 S. Ct. 1032, 83 L. Ed. 1518.

So also the declarations of the general agent of an insurance company whose duty included investigation and adjustment of claims that the insured had had a fall causing disability are admissible against the insurer. *London Guarantee & Accident Co. v. Woelfe*, (C. C. A. 8th, 1936), 83 F. (2d) 325.

Again a foreman's report of an accident to his employer is admissible. *Fitzgerald v. Lozier Motor Co.*, (1915) 187 Mich. 660, 154 N. W. 67.

And the statements of a party to a suit at the coroner's inquest as to how the accident happened are admissible in subsequent civil litigation. *Reed v. McCurd* (1899), 160 N. Y. 330, 54 N. E. 737.

It should be noted that this report was introduced at the first trial over the protest of the respondent. The question of its admissibility was argued before the Cir-

cuit Court of Appeals at the first trial in that court but was not mentioned in the court's opinion. The question was not raised before this Court at the former hearing, but there has not been any intimation by any court throughout the entire proceedings that the report is not proper evidence, and the Circuit Court of Appeals held at the last hearing that there was no error in admitting the report in evidence (R. 207).

4. The Question of an Unusual or Unexpected Movement.

This question has been fully covered in petitioner's brief in support of her petition for certiorari at page 18.

5. The Road Engine was Being Used in "Yard Service".

The question for determination here is whether the road engine was used in yard service, within the meaning of Rule 131 of the Interstate Commerce Commission regulating steam locomotives and tenders and their appurtenances, and not whether its movements were such as to justify a yard day pay for its crew under certain labor agreements between the railroad and its employees. Rules Nos. 129 and 131 of the Interstate Commerce Commission might have been limited to road engines and yard engines respectively. Instead, however, they cover "locomotives used in road service" and "locomotives used in yard service." If, therefore, a road engine is for the time being used in yard service, it must comply with the provisions of Rule No. 131.

The respondent contends that in the instant case the road engine was merely getting out of the way so that the yard engine could do the necessary switching in classifying the train. In reply, petitioner respectfully directs the attention of the Court to the movements of the two engines from the time they arrived at Clopton

Yard until the classification of the train was completed. The yard engine, when it arrived from Byrd Street, cut off certain cars and proceeded south with those cars on the main southbound line to a point south of the cross-over switch (one move). It then backed into the cross-over up to the cars on the hill where it attached one of its cars to the cars on the hill (two moves). It then retraced its movement to the southbound main line (three moves). It then backed northwardly on the southbound main line to the cars which it had left (four moves). It coupled to those cars and after making a new cut in the cars, proceeded south to the lower end of the yard (five moves).

The road engine, when it arrived at Clopton Yard, cut off three cars and proceeded with them southward across Clopton Road to Track No. 1 (one move). It then backed northward into slow siding (two moves). After the yard engine had coupled one car to the cars left on the hill and had gotten out of the way, the road engine proceeded with its three cars southward over the cross-over to the main line southbound track (three moves). It then proceeded back northwardly on the southbound main line and coupled the three cars which it was carrying, to the cars left by the yard engine on the southbound track (four moves). It then proceeded southward on the southbound main line past the cross-over switch (five moves). It then backed over the cross-over with its train of cars to the cars on the hill (six moves). After coupling all the cars, thereby completing the train, it proceeded southward over the cross-over to the southbound main line (seven moves), and continued its journey south. All of these movements were necessary to the proper classification of the train (R. 139). In this classification the road engine made seven movements within the yard, as compared with five made by the yard engine. These

movements were made over the same tracks used by the yard engine and the road engine carried with it at all times throughout the entire movement a varying number of cars. In the face of these undisputed facts, the opinions of witnesses as to whether the road engine was engaged in road or yard service are of no effect.

The Judge of the District Court offered to charge the jury as a matter of law that the road engine was used in yard service, but at the request of counsel for the petitioner submitted the question to the jury under a proper instruction. There can be no question of the fact that the evidence is sufficient to justify the jury in finding that the road engine was used in yard service. See *Chesapeake & O. Ry. Co. v. Wood*, (C. C. A. 6th, 1932) 59 F. (2d) 1017; Certiorari denied (1932) 287 U. S. 647, 53 S. Ct. 92, 77 L. Ed. 559.

6. Statutory Requirement as to a Light on the Lead End of the Back-Up Movement.

No assertion was made at any time during the trial of this case that any statute or regulation adopted pursuant to statute required a light on the lead end of the back-up movement. There was, therefore, no reason for the Court to give the charge requested by the defendant on this subject. As stated by the District Court (R. 190):

“You cannot negative every requirement. I cannot tell the jury what is not the duty; I can only tell them what is the duty.”

7. Engineering Questions.

Respondent contends that questions which he terms “engineering questions” should be left entirely to the decision of the respondent. In other words, if an engineering question is involved the railroad is at liberty to determine it to its own advantage without any con-

sideration for the safety or welfare of its employees. It is conceded that the respondent operated its railroad on that theory. Its employees recognized the fact. Mr. Myrick crudely expressed the thought when he said (R. 42):

“Everyone would have to watch for hisself in yard service.”

Certainly learned counsel for the respondent will not seriously contend, however, that the law gives the respondent any such unlimited rights.

8. Respondent's Rule 103.

Respondent's Rule 103 was published in its printed rule book and distributed to its employees. The Rule was properly admitted as evidence during the trial of the case (R. 96). The respondent elicited opinions from several of the witnesses as to the proper interpretation of the Rule. There was no error in permitting the jury to pass upon the applicability of the Rule to the facts in this case.

9. Respondent's Rule 24.

Respondent claims that the road engine was not being used in yard service and was not required to carry a rear light as prescribed by Rule 131 of the Interstate Commerce Commission because it was not engaged in “classifying” or “switching” within the yard. Respondent's Rule 24, published in its printed Rule Book and distributed to its employees, provides:

“When cars are pushed by an engine, except when shifting or making up trains in a yard, a white light must be displayed on the front end of the leading car by night.”

Here the respondent is caught between Scylla and Charybdis. The road engine was either “switching” or

"making up the train" or it was not "switching" or "making up the train". If it was switching or making up the train, it was required to have a light on the rear of the locomotive as prescribed by Rule 131 of the Interstate Commerce Commission. If it was not switching or making up the train it should have had a white light displayed on the front end of the leading car as prescribed by respondent's Rule 24. The uncontradicted evidence shows that it did not have either. Respondent, therefore, unquestionably violated either Rule 131 or Rule 24.

10. Verdict of the Jury should be Upheld on Issue Properly Submitted.

This question has been fully covered in petitioner's brief in support of her petition for certiorari, at page 11.

CONCLUSION

In conclusion, counsel for the petitioner respectfully submit that this case was carefully and properly tried in the District Court; that the judge was exceedingly patient and indulgent with both sides throughout the trial; that the case was submitted to the jury in accordance with the mandate of this Court with a charge that correctly stated the law of the case in a clear and impartial manner; that the jury properly found a verdict for the petitioner; that the District Court properly entered judgment on the verdict of the jury; and that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit reversing the judgment of the District Court should be reversed.

Respectfully submitted,

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DAVE E. SATTERFIELD, JR.

Counsel for Petitioner.

SEP 8 1944
CHARLES HENRY COOPER

Supreme Court of the United States

OCTOBER TERM 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE
ESTATE OF JOHN LEWIS TILLER, DECEASED

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF
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Supreme Court of the United States

OCTOBER TERM 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE
ESTATE OF JOHN LEWIS TILLER, DECEASED
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR FOURTH CIRCUIT.

OPINIONS BELOW

The District Court handed down no written opinion. Its order is found on pages 197-8 of the Record. The opinion of the Circuit Court of Appeals is reported 142 F. (2d) 718, and is found on pages 200 et seq. thereof. Its judgment is found on page 208.

QUESTIONS INVOLVED

Defendant assigned a number of objections to the charge to the jury (R. 191 et seq.) and a number of grounds for its motion that the verdict be set aside, etc. (R. 195-6). Before

the Circuit Court of Appeals, it insisted on all of these, save the last three objections to the charge, which had been stricken by the District Court (R. 196-7).

The Circuit Court of Appeals found that it was not necessary to pass on some of these points; it concluded that others were not sound; and it reversed the case and remanded it for a new trial because of errors in two particulars, i.e.: (1) The question of an alleged violation of the Rules of the Interstate Commerce Commission promulgated under authority of the Boiler Inspection Act should not have been submitted to the jury, because there was no evidence tending to establish a causal connection between a violation, if any, and the injuries sustained by petitioner's decedent from which he shortly died; (2) There was no evidence tending to establish a duty on defendant to give to petitioner's decedent a special warning of the movement of the cars by which he was struck.

We understand that in opposing the issuance of a writ of certiorari, the only questions involved are those decided in defendant's favor. Accordingly, the questions involved at this stage of this proceeding are:

(1) Whether there was sufficient evidence of causal connection between a violation, if any, of Rule 131 of the Interstate Commerce Commission promulgated under authority of the Boiler Inspection Act (45 U. S. C. A., Sec. 22, et seq.) and the death of petitioner's decedent to justify submission of that question to the jury.

(2) Whether there was sufficient evidence of an unusual or unexpected movement or a departure from a general practice in moving the cars that struck petitioner's decedent to demand that special warning of the movement be given him.

(3) If such warning was required, whether as a matter of law, it was not given.

(4) If one or more of several issues is erroneously submitted to the jury, whether a general verdict can be sustained.

STATEMENT OF THE CASE

In the second paragraph of Section B of the petition (p. 2), petitioner gives a factual statement which she says the Circuit Court of Appeals found warranted by the evidence. The whole of that statement, with the exception of the last sentence thereof, is a literal quotation from the opinion of the Circuit Court of Appeals (R. 201 line 21 through line 41) and in one minor particular an accurate summary of the finding of the Circuit Court found in the third paragraph on page 203 of the Record. The last sentence of petitioner's statement finds no justification either in the opinion of the Court below or in the evidence. But the Circuit Court of Appeals did not find the evidence on the second trial warranted the inference that the accident happened in the manner quoted. It expressly introduced that statement by stating:

"No one saw the accident but the evidence *at the first trial* warranted the inference that the accident occurred under the following circumstances:" (Italics supplied).

In speaking of the evidence at the second trial, it said:

"Since the evidence at the second trial *in respect to the movement of the cars* was substantially the same as at the first," etc. (Italics supplied).

The Circuit Court of Appeals did not find as stated by petitioner that the evidence *at the second trial* warranted the inference that,

"* * * Tiller was standing between two of the tracks, while using a flashlight to examine the seals on the doors of the cars on the track to the east without observing that the cars in the back up movement were approaching him on the track to the west."

This misquotation of the Circuit Court and a failure properly to summarize other facts compels us to make a succinct statement.

We attach hereto a blue print of the pertinent portion of Clopton Yard showing the initial movement of the yard engine and of the road engine, which conforms to the evidence of every witness who testified concerning them.

Clopton Yard is the southern part of defendant's Richmond, Virginia, Yards (R. 140), several miles south of the Byrd Street Yard on the north Bank of James River (R. 24, 37, 122). Clopton Yard is not lighted (R. 31, 61, 99).

Classification of Richmond cars for the south is begun at Byrd Street Yard, and, if not there completed, is completed at Clopton Yard (R. 132, 135). The Richmond cars are carried each evening to Clopton by a yard engine and crew (R. 24, 37, 122). It is not unusual for final classification of these cars to be made at Clopton (R. 66). Also, each evening the road engine of the through freight known as "First 209" brings to Clopton cars from north of Richmond, which have been assembled north of the city in the Acca Yards of the R. F. & P. R. R. Co. (R. 23-24). When both of these cuts of cars reach Clopton, the through cars for the fast freight "First 209" are assembled or classified with Weldon cars immediately behind the engine, then Petersburg cars, and finally cars for Rocky Mount and beyond (R. 39). In classifying at Clopton, sometimes one set of tracks is used, sometimes another, as convenience and the particular classification to be made may determine; sometimes this requires more moves than are required on other occasions (R. 40, 43, 64, 78-79, 103, 107, etc.)

Sergeant Tiller had been a member of defendant's police force for sixteen years (R. 16). Policemen protect the trains and merchandise (R. 145, 147, 150) and in order more efficiently to guard against theft, they are cautioned against falling into a routine (147, 151), and they avoid riding the same place on trains (144, 146). They know that the operators do not know where they may be in a yard (29, 86);

that no special warning can be or is given them of the movement of trains (144, 147, 151); and that they must watch out for their own safety (144, 147).

For a number of years Tiller had been regularly assigned to this fast freight "First 209" (R. 145, 150, 164), and he was assigned to it on March 20, 1940. He followed no set practice in catching his train at any particular point,—sometimes he caught it at Acca, sometimes at Byrd Street, sometimes at Clopton (86, 141). On March 20, 1940, it is assumed he caught it at Byrd Street, for he was seen there shortly before the Byrd Street cut left that yard, and he was not seen again until after he was injured (R. 69, 185). In doing his work, he followed no routine (R. 86, 141, 147, 164, 178).

On the night in question, the road engine, as usual, came into Clopton on the old belt line tracks from Acca (R. 25). It brought with it three hopper cars (R. 26, 38, 124) for Petersburg, behind which were twelve cars for Rocky Mount or beyond (R. 124). The yard engine, operating in reverse and pulling its cars, brought fifty-three cars to Clopton from Byrd Street, using the track marked "south bound main line" (R. 69-70). Immediately north of the yard engine were fifteen local cars which were to go south later in the evening on the local freight; next was one Petersburg car; then a Rocky Mount car; then six Petersburg cars; and finally thirty Rocky Mount cars (R. 123).

A yardmaster of forty years experience was on duty that evening at Clopton (R. 122). When he reached the yard by automobile, bringing with him the consist of the cars which were to come from Byrd Street (which consist showed the above arrangement) (R. 124), the road engine had arrived (R. 125) and was standing on the old belt line, north of Clopton Road by the yard office, marked "A" on the blue print (25, 56, 125).

He directed the road crew to cut behind the three Petersburg hopper cars, to proceed south across Clopton Road and through the switch marked "B" on to "slow-siding," or track No. 1; then to back north on slow-siding, through

switch "B", sufficiently far to clear that switch so as to permit the yard engine to push its Rocky Mount car, which was between its Petersburg cars, up to Point A, and leave it attached to the twelve Rocky Mount cars left there by the road engine (R. 56, 68, 126).

As the road crew began this movement, the yard engine was coming into Clopton (R. 37, 70, 127). It stopped about 880 feet south of Clopton Road (127), so that its seventeenth car, i.e. the Rocky Mount car between the Petersburg cars, was approximately opposite the switch point "B", and so that Clopton Road was blocked by the cars behind it (37, 62).

The yardmaster directed the yard crew to cut behind this seventeenth car, proceed with the seventeen cars to which it was to hold, south of switch "C", then pushing north through switches "C" and "B", to place this seventeenth car with the twelve Rocky Mount cars left by the road engine at "A" (R. 76, 127).

Thereafter, the yard engine, with sixteen cars (the sixteenth being a Petersburg car) was to proceed south through B and C to the south bound main line, then north so as to attach this Petersburg car to the cut it had left on south bound main line. It was then to proceed south with its fifteen local cars to a storage track at the south end of the yard (R. 128).

Thus would the yard engine have completed the classification of "First 209", which would then be in three parts. The engine and three Petersburg hopper cars on slow siding north of switch "B"; seven Petersburg cars followed by thirty Rocky Mount cars on south bound main line north of switch "C", and thirteen Rocky Mount cars on the old belt line at "A".

As the yard engine backed out of the old belt line preparatory to placing the one Petersburg car with the cut it had left on south bound main line, the road engine with the three Petersburg hopper cars was to follow through "B" and "C"; then to back north on south bound main line to pick

up its cars, which the yard engine had classified. With these cars, it was to go south so as to clear switch "C", then go north through switches "C" and "B" to get the cars at "A", which the yard engine had classified for it. It was then to proceed on its journey (R. 129).

This plan was the most expeditious of the several possible plans, one was no safer than the other, and any possible plan would have required that at some point the road engine back, pushing ahead of it the three Petersburg hopper cars (R. 129-131, 138).

By petitioner's own witnesses, it was proved that the cut of cars from Byrd Street had stopped on south bound main line across Clopton Road, before the road engine begun to back pushing ahead of it the three Petersburg hopper cars on to slow-siding (R. 38, 62, 77-8). Accordingly, while this back-up movement into slow-siding was taking place, there was no movement taking place on south bound main line north of a point opposite switch "B".

The road engine carried no headlight on the rear of its tender (R. 31) of a kind required by Rule 131 of the Interstate Commerce Commission (R. 22) to be carried by "each locomotive used in yard service". The road engine of "First 209" was not "regularly required to run backward for any portion of its trip" (R. 64), and it was not equipped with a rear headlight of a kind required by Rule 129 (R. 21) of a locomotive "used in road service" which is "regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train or in making terminal movements". The ends of the hopper cars which the road engine pushed into slow-siding were materially higher than a headlight mounted on the tender would have been (R. 172-4). Hence, a headlight on the rear of the tender, as stated by the Circuit Court of Appeals, "would not have illuminated the area ahead of the cars". (R. 205).

As the road engine backed the three hopper cars into slow-siding, at a rate of four or five miles an hour, its bell was ringing (R. 28, 104). As the lead end of the lead car of

the back-up movement passed switch "B", a brakeman got on that lead end (R. 27, 58), so as to protect the highway crossing from traffic approaching from the west (R. 62, 64). He held in his hand a lighted lantern with which he signalled the engineer backward (R. 27, 58, 63), and he alighted about the middle of Clopton Road (R. 28, 58, 63). He then waited to see that the road engine cleared switch "B" (R. 58), and gave the stop signal (29, 58). When it stopped, the road engine was south of Clopton Road (R. 41).

Just after the road engine stopped, a beam of light was seen on the ground between slow-siding and south bound main line, a few feet north of Clopton Road (R. 30, 99). This was Tiller's flashlight. About a car length further north his cap was found, then another car length his pistol, broken or open or "unbreached", and caught between the brake shoe and wheel at the lead end of the lead hopper car, Tiller himself (R. 30-31).

There is nothing in this record which shows what Tiller was doing or at what point he was hit. In its opinion, when this case was formerly before it, the Supreme Court said:

"Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track."

This was virtually the statement made by the Circuit Court of Appeals in the first appeal to it. That Court on that occasion added:

"He was struck a short distance north of Clopton Road by the backup movement of the cars from Acca Station on the slow siding."

There was in the record on the first appeal, over the objection of defendant, an unexplained report made by the Superintendent of Transportation to the Virginia State Cor-

poration Commission, giving a purported account of the accident which tended to support these findings. Since on the first trial, the District Court sustained a motion for a directed verdict, there was no occasion for defendant to explain this report and to present the documentary evidence showing it to be a figment of the imagination of the clerk who prepared it.

This report was admitted, over objection, on the second trial. It was developed, however, that the report was prepared by a clerk in the Superintendent of Transportation's office, and that said Superintendent, who signed the report, knew nothing of the facts of the accident (R. 48-49).

The clerk who prepared the report had no personal knowledge of the matter (R. 153). He introduced his complete file containing all the data he had from which to make up the report (R. 159, 161). This data consisted of three letters or reports (R. 153-5, 155-6, 157-9). Each of these letters or reports makes it clear that no one knew what was the cause of the accident, how it occurred or what Tiller was doing when it occurred. Each gives the inference or assumption of the maker of the report, and each inference or assumption is different from the others. One says that "apparently" Tiller was standing on slow-siding watching cars being handled by the yard engine (R. 155); another says "the inference is" that Tiller stepped down from the Byrd Street cars into path of road engine (R. 156); and the third says "it is assumed" that Tiller stepped from Byrd Street cars and backed into cars handled by road engine (R. 159). The Circuit Court of Appeals accordingly said: "Thus explained, the report added little or nothing to the facts in evidence." (R. 206).

The Circuit Court of Appeals found substantial evidence to show that the road engine does not "usually" back cars into slow-siding; it also found that on other occasions this same move had been made, and that slow-siding was in general used and was used for back-up movements for other purposes.

Thirteen witnesses testified upon the question of the use of slow-siding. Two witnesses of limited experience in Clopton had never made this particular move, but said that one night one move was made, another another (R. 32, 43, 47, 107). One of very limited experience in Clopton had never seen this particular move made (R. 102). Two of limited experience had seen it made on other occasions (R. 60, 111-2). Three, who had had fairly extensive experience in Clopton, had seen it made on other occasions (R. 144-5, 146-7, 150). There were five witnesses of long and broad experience in Clopton. One became hopelessly confused on the meaning of the words "usual" and "unusual" (R. 79, 80, 82). He said that on a number of occasions he had seen the road engine back into slow-siding (R. 79). A second said the particular move made on the evening in question was not a usual move (R. 89), but that "many times" he had seen a road engine back into slow-siding for one purpose or another (R. 97). A third said he had never made the particular move (R. 114, 117), but that road engines often backed into slow-siding (R. 115, 116). The other two said the particular movement often took place (R. 131, 177). To these facts, there is to be added that virtually every witness testified that at one time or another every track in Clopton is used.

Every witness questioned on the subject testified that the road engine was not being "used in yard service" but was being "used in road service" when it made the back up movement into slow-siding (R. 40, 64, 79, 97, 104, 108, 117, 142). It is clear from this testimony that if a locomotive takes a car from one point in a yard, carries it to another and leaves it, then it is classifying or switching, and is being used in yard service. If, on the other hand, an engine moves "light", i. e. the engine and tender alone, or with one or more cars to which it holds, so as to get out of the way to permit another engine to switch a car, then the former engine is used in road service (see same references, and particularly R. 117-9).

The parties entered into a stipulation (R. 148-50) which sets forth that in practice, while some of the largest rail-

road yards of the country are lighted by overhead lights, "no yard of the size and character of Clopton" is so lighted; that when cars are pushed by a locomotive in a yard at night, no headlight or other light is placed on the lead end of the back-up movement; and a locomotive equipped with a headlight for road service, but not equipped for yard service, which brings cars into a yard, is permitted to make such movement as may be necessary or convenient to get the road engine and cars adjacent thereto out of the way, so that the yard engine may do the necessary classifying and switching work.

ARGUMENT

SUMMARY OF ARGUMENT

1. The questions now presented are not of such gravity and importance as to warrant the granting of the writ.
2. The Circuit Court of Appeals correctly found that there was no evidence tending to show that a violation, if any, of the Boiler Inspection Act was a proximate cause of the death of petitioner's decedent.
3. The petition and record do not present the question whether a railroad practice can nullify a rule of the Interstate Commerce Commission.
4. The Circuit Court of Appeals correctly found that there was no evidence tending to establish a duty on defendant to give special warning to petitioner's decedent.
5. A general verdict cannot be sustained if one or more of several issues has erroneously been submitted to the jury.

I.

The Questions now Submitted are not of such Gravity and Importance as to Warrant the Granting of the Writ.

Only three questions are submitted by the petition and record: (1) Was there evidence of causal connection be-

tween a violation, if any, of the Boiler Inspection Act and the death of Tiller? (2) Was there evidence of a duty on defendant to give special warning to Tiller that a back-up movement was about to be made into slow-siding? (3) Is a general verdict good when one or more matters have been erroneously submitted to the jury?

The first two of these questions are factual. Concerning them, there is no contention that the Circuit Court of Appeals failed to recognize and understand controlling legal principles. The only contention is that it failed properly to apply recognized principles to the specific facts of this case. The third is a legal question. Petitioner, in her attempt to bring herself within the rule of practice of this Court that a writ will be allowed if a legal question of importance is the subject of conflicting decisions, says: "there is decided conflict of authority upon the question as to whether error affecting only one of two or more issues is prejudicial" (p. 12). If there be "decided conflict" astute counsel would certainly have cited the cases. At the proper point in this brief, we shall show that there is no conflict on this point.

In the opinion of this Court, when this case was formerly before it, it said: "We granted certiorari because of the important question involved in the Circuit Court of Appeals' interpretation of the scope and effect of the 1939 amendment to the Federal Employers' Liability Act". *Tiller v. A. C. L. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967. The instant petition presents no question of general importance; it presents no question of law concerning which there is conflict between lower appellate courts; it presents only the question whether recognized legal principles were correctly applied to the specific facts of this case. While there is no question of the power of this Court to grant certiorari in such a situation, it is well recognized that the Court cannot attain the great end and aim for which it was created, if in all cases in which it perhaps might differ from the lower Appellate Courts, it is to review the facts to determine whether there is evidence

to take a particular point to the jury. If in such cases certiorari is to be granted, the sound purpose of the Acts of Congress for the relief of this Court (Act of Mar. 3, 1891, 26 Stat. 826, c. 517; Act of Jan. 28, 1915, 38 Stat. 803, c. 22, 38, U. S. C. A. 211; Act of Sept. 6, 1916, 39 Stat. 726, Sect. 3, c. 448; Act of Feby. 13, 1925, 43 Stat. 936, c. 229) will be defeated. Accordingly, this Court has not allowed the writ under such circumstances. Years ago Chief Justice Fuller, in writing the Court's opinion denying a writ of certiorari in the case of *In re Woods*, 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417, said:

"But we do not regard the inquiry * * * whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

See also *American Construction Co. v. Jacksonville, etc. R. Co.* 148 U. S. 372, 37 L. Ed. 486, 13 S. Ct. 758; *Fields v. U. S.*, 205 U. S. 292, 51 L. Ed. 807, 27 S. Ct. 543; *Hamilton-Brown Shoe Co. v. Wolf*, 240 U. S. 251, 60 L. Ed. 629, 36 S. Ct. 269; *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 62 L. Ed. 385, 38 S. Ct. 140.

Furthermore, the judgment for which review is now sought is not final. The case has been remanded for a new trial, and as this Court said in *Hamilton-Brown Shoe Co., v. Wolf*, *supra*: "Except in extraordinary cases, the writ is not issued until final decree." See also, *American Construction Co. v. Jacksonville, etc., R. Co.*, *supra*.

II.

There Was No Evidence of a Causal Connection Between a Violation, if any, of the Boiler Inspection Act and the Death of Tiller.

The Circuit Court of Appeals passed over the question whether there was any substantial evidence of a violation

of the Boiler Inspection Act. For the purposes of its decision it said "we shall assume" the road engine was being used in yard service (R. 204). This assumption was contrary to every line of testimony on the matter. Every witness who testified categorically pointed out that the movement of the road engine was a movement in road service, and the Circuit Court of Appeals might well have disposed of the Boiler Inspection Act phase of the case by finding that there was no evidence of a violation. Instead of so doing, it made the assumption above mentioned, proceeded to inquire whether there was any evidence of causal connection between the assumed violation and the death of Tiller, and found that there was no evidence of such a connection.

It is not disputed that the road engine pushed ahead of it three large hopper cars, the ends of each of which extended in height to a point substantially above that which would have been attained by the top of a headlight, had a headlight been mounted on the rear of the tender of the road engine. It is, accordingly, self-evident that had there been such a rear headlight, its beams would not have been projected up the track. They would rather have been shot against the solid end of a car and the only light afforded thereby would have been such illumination as would have been diffused out to the sides and upward.

Petitioner argues that Tiller might have seen this diffused light, and, had he seen it, that he might have avoided injury. The answer is very simple. If Tiller was standing on slow-siding, or between slow-siding and south bound main line, and if he was facing so that he could have seen this diffused illumination, he could not have failed to see, on the dark night in question, the lantern which the brakeman riding the lead end of the backup movement was waving as he signalled his engineer backward.

There is, as we have pointed out, no evidence tending to show where Tiller was, or what he was doing when he was struck. It cannot even be assumed that he was struck just north of Clopton Road at the point where his flashlight was

found. If, when he was struck, he had his flashlight in his hand, it is reasonable to suppose that he immediately dropped it. But there is no evidence that he had the flashlight in his hand. There were four men who were in position to see the beams of the flashlight, if Tiller had been holding it while lighted. No one of them saw any sign thereof (R. 63, 77-8, 103, 176-7). If, when Tiller was struck, the flashlight was in his pocket, he may well have been dragged some distance before it fell out, just as he was dragged some distance before his cap fell from his head and before his pistol fell. His pistol was found open or broken, and beyond question the fall of the pistol operated to open it. No conclusion that Tiller held a lighted flashlight can be drawn from the fact that, when found, it was lighted, for just as the fall of the pistol opened it, so the fall of the flashlight may have operated to connect the electric circuit. Indeed, all we know is that when he was struck, Tiller was some place between switch point "B" and a point three or four feet north of Clopton Road.

Since we do not know what Tiller was doing when he was struck, it is perfectly possible that he was aware of the back-up movement and slipped or fell underneath or against it. The evidence shows that on the night in question he had on an unusual amount of clothing (R. 143). It is perfectly possible that having waited until the cars from Byrd Street had stopped, Tiller jumped out of one of those cars under the back-up movement. He was to guard against theft, look out for tramps, etc. It is perfectly possible that as the back-up movement was slowly taking place, he attempted to mount the ladder on the eastern side of the lead end of the back-up movement to see whether anyone was in that hopper car, and that in doing so he slipped. Before it can be said that a failure to furnish the diffused illumination above mentioned was a proximate cause of the injury and death of Tiller, it is necessary that we know where Tiller was and what he was doing, and those questions are left completely unanswered by this record. In its former opinion in this

case, this Court pointed out that a plaintiff must prove the negligence of the defendant. It is equally well settled that causal connection must be proved and that a jury is no more permitted to speculate concerning the cause of an accident than to speculate concerning the existence of negligence. *Chicago M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; *Atchison, etc. R. Co., v. Toops*, 281 U. S. 351, 74 L. Ed. 602, 50 S. Ct. 281; *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391; *Brady v. Southern R. Co.*, 88 L. Ed.; *Tennant v. Peoria, etc. R. Co.*, 321 U. S. 29, 88 L. Ed. 322. And it is equally well settled that a violation of a Safety Appliance Act creates no right of action unless it is the proximate cause of an injury. *Lang v. N. Y. Cent. R. Co.*, 225 U. S. 455, 65 L. Ed. 729, 41 S. Ct. 381.

III.

The Petition and Record Does not Present The Question Whether a Railroad Practice Can Nullify a Rule of the Interstate Commerce Commission.

In her petition, petitioner says that this question is presented (p. 5). We assert that this question is not presented. We have never contended and do not propose by action of petitioner to be placed in the position of contending that a valid rule of the Interstate Commerce Commission can be abrogated by a practice of the railroad, and the Circuit Court of Appeals did not hold that a rule of said Commission could be nullified by railroad practice.

The petitioner argued below and argues here that Rule 131 not only requires that a locomotive used in yard service be equipped with a rear headlight, but also that it forbids such locomotive to push cars ahead of it so as to obscure the headlight. The Circuit Court of Appeals held that the petitioner's interpretation of the Rule was not sound, and it specifically held "that no rule forbids" a railroad from permitting a locomotive used in yard service to push cars ahead of it when such cars obscure the headlight. That this

is an accurate construction of the rule, cannot be questioned. This evidence shows, and indeed the Court might take judicial knowledge of the fact that in the railroad yards of this country locomotives push cars ahead of them as frequently as they pull cars behind them. The Rules of the I. C. C. promulgated under the Boiler Inspection Act have been in effect for more than thirty years. Inspectors of the Commission are constantly in and out of railroad yards, yet no one has ever contended that this uniform practice of the roads is violative of Rule 131. Acquiescence by the Commission through all these years in this practice is as strong a practical construction by the Commission of its Rule as could be had, and is as clear a construction as if the Commission had specifically passed upon the question.

There is another conclusive answer to this extreme contention of petitioner. Probably every yard in the country, certainly most of them, have many deadend tracks. If, during the night time, a locomotive may not push a car, no car could be stored on any one of those tracks unless the locomotive which pulled it into the track, were likewise to remain on that track until daylight. If petitioner's construction of the Rule be correct, cars could not be classified at night because it would be impossible to push one car up to another for coupling purposes. If her construction be correct, work in yards all over the country must cease with night and can be resumed only at dawn.

Finally, petitioner overlooks the fact that the Boiler Inspection Act authorizes the Commission to make rules and regulations concerning the condition and appliances of locomotives and tenders only. It is not necessary to inquire whether some other legislation would authorize the Commission effectively to prohibit work in classification yards during the night time. Certainly the Boiler Inspection Act gives to the Commission no authority to prescribe rules concerning the uniform classification practices of railroads, and the Commission under the authority of that Act has not attempted so to do.

We cannot pass over in silence the totally improper argument of petitioner found at the top of page 17 of her brief, wherein she sees fit to refer to an *ex parte* report of the Commission concerning the accident reports of this defendant and some other railroads. She and her attorneys cannot think that this *ex parte* report of the Commission is any evidence that this defendant was guilty of an act of negligence in connection with the injuries and death of her decedent. No attempt was made to introduce it in evidence. Had they attempted to refer to it in argument to the jury, they would have been instantly stopped, because the attempt would have been a clear effort to appeal to bias, prejudice and passion. The respect in which this Court is entitled to be held should preclude any attempt to make such an appeal to it.

IV.

There Was no Evidence Tending to Establish a Duty on Defendant to give Special Warning to Tiller of the Back-up Movement on Slow-Siding.

It is well settled that if by rule or custom a regular and recognized practice has been established in a yard, and if there is to be a departure from that practice so that some unprecedented and unexpected change in the manner of operations is to take place, special warning thereof must be given to those for whose benefit the rule has been promulgated, or the custom has come into existence. *Fernand v. Boston & M. R. Co.*, 62 F. (2d) 782; *C. & O. R. Co. v. Mihas*, 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42. Accordingly, before a person is entitled to a special warning, the evidence must show (1) that a movement was made which was violative of some rule or of an established custom, or, to express it differently, that the move was unprecedented and unexpected, and in addition thereto the evidence must show (2) that the injured person to whom no warning was given was a member of the class for whose benefit the rule was promulgated, or the custom established.

Petitioner made a great effort to show that by custom slow-siding north of switch point "B" was not used for back-up movements, or at least that locomotives pushing cars did not back along that track. She attempted to establish this alleged fact by asking an operator whether he had ever made such a movement, (e.g. R. 32, 71), or whether such a movement was a usual movement (e.g. R. 89). It was, however, conclusively brought out in evidence that each witness who had never made the movement or seen it made, had been in Clifton Yard only on relatively few occasions, and it was brought out from every witness who had had any reasonable amount of experience in the yard that "many times", (R. 97); "on a number of occasions" (R. 79); "time and again" (R. 131); "real often" (R. 177), an engine pushes cars ahead of it north into slow-siding.

At the bottom of Page 18 of her petition, petitioner makes the strange statement:

"A careful reading of the record will show that the evidence as to previous similar movements, the general use of the track which was a siding and its use for back-up movements for other purposes *was negligible.*" (Italics supplied).

In the statement of fact, we have referred to the specific page of the record where the testimony of each witness on this subject is to be found. Fortunately, that testimony cannot be contradicted by petitioner's unsupported statement. We vouch the record for our statement that each witness competent to testify concerning a custom, if any, in Clifton Yard, testified that back-up movements on slow-siding were matters of frequent occurrence, and that those who were not competent to testify of a custom because of their relatively slight experience in the yard, gave only negative testimony, i. e. that in the relatively few times they had been in the yard they had not seen this movement made.

Petitioner charges that: "The Circuit Court of Appeals has evidently confused the unusual movement doctrine with the doctrine which involves the violation of a rule, regula-

tion or custom established by the employer." (Brief, p. 19). The confusion is not with that Court, it is with petitioner. It is impossible to have an unusual, unexpected or unprecedented movement, unless it involves a departure from practice, established use, custom, rule or regulation. It is self-evident that departure from custom, presupposes the existence of custom.

Petitioner made no effort to show that such a custom, if it existed at all, existed for the benefit of men working in the yard, or, more specifically, that it existed in part for the benefit of an employee, the nature of whose work required that he make an effort to keep others from knowing where he was. This evidence shows that access could be gotten to the water tank at Clopton only by backing up slow-siding, or by backing down it. Railroads build tracks to be used not as ornaments. If such a custom had existed, it is much more reasonable to assume that it existed for the benefit of those using the public highway than that it existed for any other purpose. At any rate, if petitioner wished to rest on this point, there was upon her the burden of proof, yet she introduced and attempted to introduce not one scintilla of evidence on it. The decision of Mr. Justice Holmes in *C. & O. R. R. Co. v. Nixon*, 271 U. S. 218, 70 L. Ed. 915, 46 S. Ct. 495 is conclusive on this point.

While defendant knew that Tiller's duty called him to the yard, it had no way of knowing that he would be near slow-siding. It gave as it always gives, loud warning of the movement of the road engine, for the automatic bell was continuously ringing during the whole of the back-up movement.

V.

A General Verdict Cannot be Sustained if one or More of Several Issues have Erroneously been Submitted to the Jury.

So the Circuit Court of Appeals held in strict conformity with the opinion of this Court handed down in *Wilmington*

Star Mining Co. v. Fulton, 205 U. S. 60, 51 L. Ed. 708, 27 S. Ct. 412, and in strict conformity with the other decisions cited in the opinion.

Petitioner says: "there is a decided conflict of authority upon the question" (Brief, p. 12). But there is no such conflict. So far as we have been able to ascertain in all cases that have come before a Circuit Court of Appeals (save those arising in Illinois where by analogy to a specific and peculiar provision of the Illinois Practice Act the contrary is held, and where the Federal Courts have felt compelled to follow the peculiar rule of Illinois) it has universally been held that if over objection, the trial court has erroneously permitted one or more matters to go to a jury, a general verdict cannot be upheld even though other questions were correctly submitted to the jury. The following cases are clear on this point, *Erie R. Co. v. Gallagher*, (2nd Cir.), 255 F. 814, 817; *Christian v. Boston*, (2nd Cir.) 109 F. (2d) 103, 105; *James Stewart & Co. v. Newby*, (4th Cir.) 266 F. 287, 291; *Travelers Insurance Co. v. Wilkes*, (5th Cir.) 76 F. (2d) 701, 705; *Buckeye Cotton Oil Co. v. Sloan*, (6th Cir.) 250 F. 712, 722.

Perhaps no court has better set forth the reasons for this rule than has the Eighth Circuit Court of Appeals in *Chicago St. P. M. & O. Ry. Co. v. Kroloff*, 217 F. 525, 528, wherein the Court said:

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"A refusal by the Court to grant a specific request to withdraw from the jury one of several specific charges of negligence on which plaintiff is seeking to recover is fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice, and the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict."

In the State of Illinois the contrary rule prevails. *Scott v. Parlin, et al.*, 245 Ill. 460, 92 N. E. 318. But as was said

by the Circuit Court of Appeals for the Seventh Circuit in *Chicago Rys. Co. v. Kramer*, 234 F. 245, 250, this peculiar rule of Illinois is based "on the analogy of Section 78 of the Illinois Practice Act".

The petitioner confuses two situations which are radically different. In the first situation two or more issues have been submitted to the jury, at least one of which is supported by no substantial evidence, and to the submission of that issue proper and timely objection has been taken. In such event the rule of *Wilmington Star Mining Co. v. Fulton*, *supra*, prevails. The other situation arises when two or more issues have been submitted to the jury, at least one of which is unsupported by substantial evidence, but no objection to the submission of that issue has been made, and the defendant has rested on a motion for a directed verdict. Since in the second situation there was an issue properly submitted to the jury the motion of defendant is, of course, to be denied. This is brought out very clearly by the Circuit Court of Appeals for the Ninth Circuit in *Southern Pac. Co. v. Kauffman*, 50 F. (2d) 159, 164, where it says:

"Appellant claims that the Court erroneously denied its motion for a directed verdict on the count charging negligence in the case of the wigwag signal. If this motion had been separably presented, it should have been granted (*Wilmington Star M. Co. v. Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708), but the motion was for a general verdict in favor of the defendant on all the counts and was properly denied if on any count or charge of negligence alleged the jury could find a verdict for the plaintiff under the evidence. The question was not raised by any other requested instruction."

The instant case does not present such a situation, for as is pointed out by the Circuit Court of Appeals, we not only moved at the end of the plaintiff's case and at the end of the whole case for a directed verdict upon a number of specific grounds, but we also moved that evidence in respect

to the Boiler Inspection Act be stricken (R. 204). In addition thereto we objected to the instruction of the Court, upon the ground that there was no evidence upon which the issue of an unexpected and unprecedented movement might be submitted to the jury (R. 191).

The only Federal case that we have been able to find which clearly takes position contrary to the rule announced by the Circuit Court of Appeals, is *Stephenson v. Grand Trunk Western R. Co.*, (7th Cir.) 110 F. (2d) 401. That was an appeal from the District Court of the United States for the Northern District of Illinois. The Court pointed out that the Illinois rule, as decided by the highest appellate court of Illinois, was contrary to the general rule as announced in the *Wilmington Star Mining Co.* case. It said on page 407, that the question involved "is one of practice or procedure, in which the statute or decision of the state court must be followed", and for this reason and for this reason alone, it did not follow the doctrine of the *Wilmington* case.

If the Seventh Circuit Court of Appeals was correct, and if this is a question of practice or procedure in which the state rule is to be followed, the question here becomes very easy of answer. For the rule in Virginia is clear. Its Supreme Court of Appeals, its highest court, has decided this question in exact accord with the opinion of the Circuit Court of Appeals in the instant case. *Craig-Giles I. Co. v. Wickline*, 126 Va. 223, 237, 101 S. E. 225.

With such an array of authority against her, and with such powerful reasons sustaining the rule, petitioner drew a long bow when she spoke of "a decided conflict of authority". If she were willing to make such a categorical statement it is passing strange that she could find nothing to support it. She says that this court has given tacit approval to her view because it denied certiorari in the two cases cited by her. Even if those two cases sustained her she overlooks the fact that a denial of certiorari by this court imports no expression of opinion by this court on the merits

of the case, *Hamilton Brown Shoe Co. v. Wolf*, *supra*; *A. C. L. R. Co. v. Powe*, 283 U. S. 401, 75 L. Ed. 1142, 51 S. Ct. 498.

The best that petitioner could find were two decisions of the Seventh Circuit Court of Appeals arising, in each instance, out of an appeal from a United States District Court in Illinois.

The first of these two cases is *Cross v. Ryan*, (7th Cir.) 124 F. (2d) 883. This was an action under an Illinois Statute to recover damages for the loss of a husband's and father's services due to intoxication. The complaint was in twelve counts and charged three causes of action. Each of the counts was held to state a good cause of action. Defendant had moved for judgment notwithstanding the verdict and, by a motion for a new trial, he questioned the sufficiency of the evidence to support the causes of action. The evidence was found sufficient. The Court does state that if any count is sustained by evidence, the general verdict must be upheld. It seems to be implicit in the opinion that this motion for a new trial was based on no particular issue or issues, but went to the whole case, as does a motion for a directed verdict. If this be true, the statement is in accord with general law. If, on the other hand, the motion for a new trial was based on the alleged lack of evidence to sustain certain points, then the statement was not in accord with the general law, but was in accord with the peculiar Illinois Law, to which the same Circuit Court of Appeals had decided, as hereinabove shown, it must adhere.

The other case cited by petitioner is *Miller v. Advance Transp. Co.*, (7th Cir.) 126 F. (2d) 442. That was an automobile accident case, wherein violation of the Illinois Highway Statute and acts of common law negligence were charged. Defendant raised the question of the sufficiency of the evidence to support the verdict. The Court found that there was evidence to sustain all charges of negligence. Here, also, the Court made the statement that if one charge was sustained, it must uphold the verdict. The comments

have made with reference to the preceding case are equally applicable here.

Accordingly, an examination of the authorities shows that there is no "decided conflict". The authorities are uniform, with the exception of a decision, and perhaps decisions, of the Seventh Circuit Court of Appeals, arising from appeals from the United States District Courts in Illinois, and that decision is predicated solely on a decision of the Illinois Court arrived at by virtue of an analogy to its statutory practice act and followed by the Circuit Court of Appeals only because it considers this matter to be one of practice and procedure, and, hence, that it is bound by the Illinois rule in cases arising in Illinois.

CONCLUSION

We have dealt in this brief only with those points decided in our favor by the Circuit Court of Appeals, believing as stated at the beginning that they are the only questions involved at this stage of this procedure.

For the foregoing reasons, we submit that the petition should be denied.

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ATLANTIC COAST LINE RAILROAD COMPANY

TILLER VS ATLANTIC COAST LINE RAILROAD

ROAD

South Richmond
Stock Yard

ROAD

To Erie

CLOPTON

North

~ LEGEND ~

== Yard Track Movement
== Movement of Train Stop

PLAT SHOW
TRACK AND
MOVEMENT
CLOPTON Y
Scale 1"=100'

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OCTOBER TERM 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE
ESTATE OF JOHN LEWIS TILLER, DECEASED,
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT

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Supreme Court of the United States

OCTOBER TERM 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE
ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT

The plaintiff appellant has filed a statement that she will rely upon her brief in support of her petition for certiorari as her brief on argument. Were the only points involved those decided against her by the Circuit Court of Appeals, we should do likewise. But the whole record is before this Court, and we propose to urge, as we are at liberty to do (*U. S. v. American Ry. Express Co.*, 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 560; *Langnes v. Green*, 282 U. S. 531, 75 L. Ed. 520, 51 S. Ct. 243; *Morley v. Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, 57 S. Ct. 325; *Helvering v. Pfeiffer*, 302 U. S. 247, 82 L. Ed. 231, 58 S. Ct. 159; *Le Tulle v. Scofield*, 308 U. S. 415, 84 L. Ed. 355, 60 S. Ct. 313) matter appearing in that record and not touched upon in the petition for the writ or in the brief in support thereof. Hence this brief.

OPINIONS BELOW

The District Court handed down no written opinion on the merits of the case. Its order is found on pages 197-8 of the Record. The opinion of the Circuit Court of Appeals is reported in 142 F. (2d) 718, and is found on pages 200 *et seq.* thereof. Its judgment is found on page 208.

STATEMENT OF THE CASE

In part, we rely upon the lack of any credible evidence to sustain a verdict. It is, accordingly, necessary to show what the evidence was, for only 'y so doing can this negative proposition be sustained.

The original complaint was specifically filed under the Federal Employers' Liability Act, 45 U. S. C. A. 51, *et seq.* (R. 2).

It charged negligence in seven particulars, i. e. (1) failure to keep a lookout, (2) failure to give proper warning signals, etc. Each of these particulars alleged an affirmative act of negligence—such an act as would permit a recovery at common law. No one of them intimated the violation of any statutory duty or safety appliance act.

More than three years after the accident and death, the plaintiff was permitted to amend by alleging the violation of the Boiler Inspection Act, 45 U. S. C. A. 22 *et seq.*, and the rules and regulations of the Interstate Commerce Commission prescribed pursuant thereto. The new matter is found in the first twelve printed lines of par. 5 of the Amended Complaint (R. 7-8).

Defendant opposed the motion to amend (R. 5-6) and later moved to strike the amendment (R. 12, 121, 179, 195-6).

Defendant's Clopton Yard is the southern part of its Richmond, Virginia, yards (R. 140). There Sergeant J. L. Tiller received fatal injuries between seven and seven-fifteen P. M. on the night of March 20, 1940 (R. 31). Clopton Yard is not lighted (R. 31, 61, 99). The northern part of the

Richmond Yards lies on the north bank of James River and is known as Byrd Street Yard (R. 24, 37, 122).

Attached to our brief in opposition to the petition for the writ of certiorari is a blueprint of the pertinent part of Clopton Yard, which conforms to the testimony of all witnesses.

Classification of Richmond cars for the south is begun at Byrd Street Yard, and, if not there completed, is completed at Clopton Yard (R. 132, 135). The Richmond cars are carried each evening to Clopton by a yard engine and crew (R. 24, 37, 122). It is not unusual for final classification of these cars to be made at Clopton (R. 66). Also, each evening the road engine of the through freight known as "First 209" brings to Clopton cars from north of Richmond, which have been assembled north of the city in the Acca Yards of the R. F. & P. R. R. Co. (R. 23-24). When both of these cuts of cars reach Clopton, the through cars for the fast freight "First 209" are assembled or classified with Weldon cars immediately behind the engine, then Petersburg cars, and finally cars for Rocky Mount and beyond (R. 39). In classifying at Clopton, sometimes one set of tracks is used, sometimes another, as convenience and the particular classification to be made may determine; sometimes this requires more moves than are required on other occasions (R. 40, 43, 64, 78-79, 103, 107, etc.).

Sergeant Tiller had been a member of defendant's police force for sixteen years (R. 16). Policemen protect the trains and merchandise (R. 145, 147, 150) and in order more efficiently to guard against theft, they are cautioned against falling into a routine (R. 147, 151), and they avoid riding on the same place of trains (R. 144, 146). They know that the operators do not know where they may be in a yard (R. 29, 86); that no special warning can be or is given them of the movement of trains (R. 144, 147, 151); and that they must watch out for their own safety (R. 144, 147).

For a number of years Tiller had been regularly assigned to this fast freight "First 209" (R. 145, 150, 164), and he

was assigned to it on March 20, 1940. He followed no set practice in catching his train at any particular point,—sometimes he caught it at Acca, sometimes at Byrd Street, sometimes at Clopton (R. 86, 141). On March 20, 1940, it is assumed he caught it at Byrd Street, for he was seen there shortly before the Byrd Street cut left that yard, and he was not seen again until after he was injured (R. 69, 185).

Sergeant Tiller followed no routine in doing his work (R. 86). At times he was seen checking seals "at various places from Byrd Street down to the south end of Clopton Yard" (R. 86 and in Byrd Street Yard (R. 147). He had been seen inspecting seals "all over the yard", "south of the crossover switch", "at the south end of the yard", "north of Clopton Road" (R. 141). Another witness, who off and on for ten or twelve years had seen Mr. Tiller about his work, said: " * * * there was no specific place for him to be. I might see him in No. 5 track to-night and a little later I might see him around No. 2 track, just going around about" (R. 164). Another says: "I have seen him everywhere" (R. 178).

Only one witness gave any testimony suggesting that Mr. Tiller had developed any habit. Switchman Waymack said that when Tiller rode the cut of cars from Byrd Street, he generally got off on the west side, some place between a point 15 car lengths (about 600 feet) north of Clopton Road and the switches south of it, and walked to the rear or northwardly. But Waymack also said that Tiller followed no regular routine, that he came to Clopton Yard in different ways, and that he had seen him doing his work all the way from Byrd Street to Clopton (R. 85-86).

On the night in question, the road engine, as usual, came into Clopton on the old belt line tracks from Acca (R. 25). It brought with it three hopper cars (R. 26, 38, 124) for Petersburg, behind which were twelve cars for Rocky Mount or beyond (R. 124). The yard engine, operating in reverse and pulling its cars, brought fifty-three cars to Clopton from Byrd Street, using the track marked "south bound

main line" (R. 69-70). Immediately north of the yard engine were fifteen local cars which were to go south later in the evening on the local freight; next was one Petersburg car; then a Rocky Mount car; then six Petersburg cars; and finally thirty Rocky Mount cars (R. 123). Neither engine had Weldon cars.

A yardmaster of forty years' experience was on duty that evening at Clopton (R. 122). When he reached the yard by automobile, bringing with him the consist of the cars which were to come from Byrd Street (which consist showed the above arrangement) (R. 124), the road engine had arrived (R. 125) and was standing on the old belt line, north of Clopton Road by the yard office, marked "A" on the blueprint (R. 25, 56, 125).

He directed the road crew to cut behind the three Petersburg hopper cars, to proceed south across Clopton Road and through the switch marked "B" (which is about 200 feet south of Clopton Road) (R. 89, 126) on to "slow-siding," or track No. 1; then to back north on slow-siding, through switch "B", sufficiently far to clear that switch so as to permit the yard engine to push its Rocky Mount car, which was between its Petersburg cars, up to point "A", and leave it attached to the twelve Rocky Mount cars left there by the road engine (R. 56, 68, 126).

As the road crew began this movement, the yard engine was coming into Clopton on southbound main line (R. 37, 70, 127). It stopped about 22 car lengths—880 feet—south of Clopton Road (R. 76, 127), so that its seventeenth car, i. e. the Rocky Mount car between the Petersburg cars, was approximately opposite the switch point "B", and so that Clopton Road was blocked by the cars behind it (R. 37, 62).

The yardmaster directed the yard crew to cut behind this seventeenth car, proceed with the seventeen cars to which it was to hold, south of switch "C", then pushing north through switches "C" and "B", to place this seventeenth car with the twelve Rocky Mount cars left by the road engine at "A" (R. 76, 127).

Thereafter, the yard engine, with sixteen cars (the sixteenth being a Petersburg car) was to proceed south through "B" and "C" to the south bound main line, then north so as to attach this Petersburg car to the cut it had left on south bound main line. It was then to proceed south with its fifteen local cars to a storage track at the south end of the yard (R. 128).

Thus would the yard engine have completed the classification of "First 209", which would then be in three parts. The engine and three Petersburg hopper cars on slow siding north of switch "B"; seven Petersburg cars followed by thirty Rocky Mount cars on south bound main line north of switch "C", and thirteen Rocky Mount cars on the old belt line at "A".

As the yard engine backed out of the old belt line preparatory to placing the one Petersburg car with the cut it had left on south bound main line, the road engine with the three Petersburg hopper cars was to follow through "B" and "C"; then to back north on south bound main line to pick up its cars, which the yard engine had classified. With these cars, it was to go south so as to clear switch "C", then go north through switches "C" and "B" to get the cars at "A", which the yard engine had classified for it. It was then to proceed on its journey (R. 129).

This plan was the most expeditious of the several possible plans, one was no safer than the other, and any possible plan would have required that at some point the road engine back, pushing ahead of it the three Petersburg hopper cars (R. 129-131, 138).

In our brief before the Circuit Court of Appeals, we made an extended detailed statement of fact, the accuracy of which was questioned by plaintiff in only one major and two very minor respects. We said that as the road engine backed north on slow-siding, pushing the three hopper cars in front of it, the cars from Byrd Street were standing still on south-bound main line across Clopton Road, and we said there was no evidence to the contrary. This is a major point, for

if our statement be accurate, the plaintiff's theory that Tiller was standing on or near slow-siding watching cars *moving* on south bound main line is exploded.

In her brief before the Circuit Court, the plaintiff said: "there is at least some conflict in the evidence relating to this inquiry".

Six, and only six, of the witnesses were in position to know—Myrick, the road engineer, Dickens, the road brakeman, Waymack, the yard trainman, Wright, the road fireman, Jones, the yardmaster, and Crews, the car inspector.

Engineer Myrick testified (R. 38):

"Q. And, as I understand it, when you were backing up, these cars were then in four sections? You had left one section up here on the hill? A. That is right.

Q. You had with you three hopper cars that you were backing into slow siding? A. That is right.

Q. The south end of the cars from Byrd Street was being pulled by the yard engine on down to the south end of the yard? A. That is right.

Q. The north end of the cars from Byrd Street, which were astride Clopton Road, were standing still? A. Yes, sir."

Brakeman Dickens testified (R. 62):

"Q. So that Clopton Road was protected from west-bound traffic or traffic from the east by the cars of First 209 which were standing on Clopton Road?

A. Yes, sir."

Trainman Waymack made the cut in the cars from Byrd Street. He testified that as the yard engine with the seventeen cars pulled south, leaving cars astride Clopton Road, the road engine was beginning to back into slow-siding (R. 77-8).

On cross-examination, Wright, fireman of the road engine, indicated that as the road engine backed, cars were standing still on south bound main line across Clopton Road (R. 103). At his request, he returned to the stand to make it clear that

he did not remember whether the cars were or were not moving (R. 120).

Car Inspector Crews was walking between the two trains as the road engine backed, but he did not recall whether or not the cars from Byrd Street were standing still (R. 176-7).

It is the testimony of Yardmaster Jones that petitioner quoted when she said there was conflict. Mr. Jones' testimony is not clear. He first says (R. 127): "The movement of the two trains was simultaneously". Again (R. 127): "At the time the cut was made I don't know definitely. I can't say". Then in the very same answer (R. 127-8): "I am inclined to believe that Mr. Myrick was moving backward. I know he was moving backward at the time the train arrived from Byrd Street but where Myrick was at the identical moment that Waymack cut that car loose, I am not clear". Finally (R. 128):

"Q. In other words, you can't give us any definite testimony on that matter?

"A. No, sir."

The road engine carried no headlight on the rear of its tender (R. 31) of a kind required by Rule 131 of the Interstate Commerce Commission (R. 22) to be carried by "each locomotive used in yard service". The road engine of "First 209" was not "regularly required to run backward for any portion of its trip" (R. 64), and it was not equipped with a rear headlight of a kind required by Rule 129 (R. 21) of a locomotive "used in road service" which is "regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train or in making terminal movements". The ends of the hopper cars which the road engine pushed into slow-siding were materially higher than a headlight mounted on the tender would have been (R. 172-4). Hence, a headlight on the rear of the tender, as stated by the Circuit Court of Appeals, "would not have illuminated the area ahead of the cars". (R. 205).

As the road engine backed the three hopper cars into slow-siding, at a rate of four or five miles an hour, its bell was ringing (R. 28, 104). As the lead end of the lead car of the back-up movement passed switch "B", brakeman Dickens got on that lead end (R. 27, 58), so as to protect the highway crossing from traffic approaching from the west (R. 62, 64). He held in his hand a lighted lantern with which he signalled the engineer backward (R. 27, 58, 63), and he alighted about the middle of Clopton Road (R. 28, 58, 63). He then waited to see that the road engine cleared switch "B" (R. 58), and gave the stop signal (R. 29, 58). When it stopped, the road engine was south of Clopton Road (R. 41).

Just after the road engine stopped, a beam of light was seen on the ground between slow-siding and south bound main line, a few feet north of Clopton Road (R. 30, 99). This turned out to be Tiller's flashlight. About a car length further north his cap was found, then another car length his pistol, broken or open or "unbreached", and, caught between the brake shoe and wheel at the lead end of the lead hopper car, Tiller himself (R. 30-31).

There is nothing in this present record which shows what Tiller was doing or at what point he was hit. In its opinion, when this case was formerly before it, the Supreme Court said:

"Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track."

This was virtually the statement made by the Circuit Court of Appeals in the first appeal to it. That Court on that occasion added:

"He was struck a short distance north of Clopton Road by the backup movement of the cars from Acca Station on the slow siding."

There was in the record on the first appeal, over the objection of defendant, an unexplained report made by defendant's Superintendent of Transportation to the Virginia State Corporation Commission, which report was admitted in evidence on the second trial as Plaintiff's Exhibit No. 3 (R. 193-195). The pertinent part of the report reads as follows:

"J. L. Tiller * * went with yard engine taking cut of cars to Clepton, Va., to be placed in freight train stepped off engine upon arrival and was looking over the cars as they passed. He was standing on adjoining track for this purpose when road engine with several cars ahead of engine backed into this track. He was struck by the first car and dragged several feet receiving injuries which resulted in death * * *".

On the first trial, and at the conclusion of plaintiff's testimony, the District Court sustained defendant's motion for a directed verdict. Hence, there was neither opportunity nor necessity for defendant to present the documentary evidence which showed this report to be a figment of the imagination of the clerk who prepared it. On the second trial, it was admitted over objection (R. 22, 196), and proof that it was purely imaginary was also introduced.

The Superintendent of Transportation, who signed the report, testified that it was made up in his office in Savannah, Georgia, by J. M. Parrish, one of his clerks, and that he knew nothing of the facts of the accident (R. 48-49).

J. M. Parrish testified at length. He had no personal knowledge of the matter (R. 153). He derived his information from a telegraphic report sent from Rocky Mount, North Carolina, by R. G. Murchison, Superintendent, on March 20, 1940 (R. 153-5); from a copy of a letter of April 4, 1940, from Mr. Murchison (R. 155-6); and from a report of April 9, 1940, from R. W. Wilbourne, Conductor, and W. M. Myrick, Engineer, of "First 209" (R. 157-9). This was all the data he had (R. 159, 161). The report required by 45

U. S. C. A. 38 to be made to the Interstate Commerce Commission was made up from this data (R. 160, 162); that to the Virginia Commission was made up a few days later from memory, reference being made to the I. C. C. report for times and dates only (R. 162).

The telegraphic report of March 26 from Superintendent Murchison, after describing the movement of the trains, says:

"* * * apparently Mr. Tiller standing on slow siding watching 62 cars being handled by yard engine passing on main line was backed over by INT Car 5168 being handled by Engine 1635 backing into slow siding no witnesses * * *". (R. 155)

The copy of the letter of April 4, 1940, from Mr. Murchison says in part:

"The inference is that Mr. Tiller stepped down from the cars being handled by the yard engine into the path of road engine shoving into the slow siding". (R. 156)

The report of April 9, 1940, from Messrs. Wilbourne and Myrick says in part:

"State fully *cause* of accident. Not known" (R. 158)

"It is assumed that Mr. Tiller got off cars yard engine brought to Clopton for us to pick up and backed into the cars we were backing into side track to clear for yard engine to make a switch to our train which was standing on old branch line". (R. 159).

The evidence heretofore set forth conclusively shows that no cars were moving on southbound main line from a point 200 feet south of Clopton Road to a point far north thereof. Tiller was, therefore, not inspecting seals of passing cars.

The evidence furthermore shows that he was not holding a *lighted* flashlight. As the road engine backed north

on slow siding, Wright, its fireman, was sitting on the east side of the cab, looking north up the area between his cars and the standing cars from Byrd Street. He had an unobstructed view. He saw no light or beam of light around Clopton Road, or immediately north of it (R. 103).

Waymack, switchman of the yard crew, after making the cut on those cars, stepped across southbound main line preparatory to going up on the hill (R. 77). This caused him to face north up the area between slow siding and southbound main line; he saw no beam of a flashlight around Clopton Road (R. 78).

It is certain that Tiller was struck some place between the switch 200 feet south of Clopton Road, and the point where his flashlight was found, 4 to 6 feet north of Clopton Road. Dickens, the brakeman, was riding the lead end of the back-up movement, either when Tiller was struck or up to a point within a few feet of the place he was struck. He saw no light or person (R. 63). His testimony on this point is, however, not strong, for he was watching for traffic coming east on Clopton Road (R. 63).

Finally, Crews, the car inspector, crossed slow siding on foot at Clopton Road after the back-up movement had begun (R. 176). He was then within a few feet of the spot where the flashlight was found. He neither saw there a person nor any sign of a flashlight (R. 177).

This, together with what we have heretofore pointed out, is every item of evidence or scintilla of evidence throwing any light on the question—"Where was Tiller when he was struck, and what was he doing?" If the flashlight was in his hand when he was struck, he probably dropped it instantly. But, there is no evidence that it was in his hand. No inference can be drawn from the fact that it was lighted when found, for the fall may have lighted it, just as the fall of his pistol opened or broke it. If the flashlight was in his pocket when he was struck, he may have been dragged some distance before it fell out, just as he was dragged some distance before his cap or his pistol fell.

There is no evidence tending to show whether Tiller was standing on slow siding and was not aware of the approach of the back-up movement; whether he was trying to cross slow siding and slipped; whether he was walking between slow siding and southbound main line, as Crews was walking, and slipped; whether he stepped off cars from Byrd Street or slipped or fell therefrom under the back-up movement; whether he was trying to swing on the back-up movement to look for trespassers in the hopper car, and slipped; etc.

Plaintiff has contended vigorously that the back-up movement of the road engine into slow siding was unusual, "unprecedented and unexpected" (R. 8). The Circuit Court of Appeals found that the evidence showed the same movement had been made on other occasions, and that slow siding was in general use both for back-up movements and other purposes. The record contains much evidence on this subject from fourteen witnesses.

When this case was first tried, Myrick, engineer of the road engine, testified that before Tiller's death only occasionally was he in Clopton Yard; and that for two or three years prior thereto he had been in Clopton only two or three times a month (R. 44). On the second trial, he testified on direct examination that from 1924, he had been in Clopton five or six times a month (R. 32). On cross-examination he said four to six times a month (R. 42), and was then confronted with his original testimony (R. 44). On redirect, he came down to three or four times a month (R. 45). He testified that he had never before backed into slow siding (R. 32, 47). He also testified that one night one set of tracks is used, another, another (R. 43).

Dickens, brakeman of the road crew, testified that in his years with the road, he had been in Clopton as a member of the road crew approximately forty times (R. 59), and that he had seen the road engine make the back-up move into slow siding, but he did not know how many times (R. 60). Prior to Tiller's death, he had been in Clopton

twelve to twenty times, but had never seen that movement made (R. 60). He stated that it was not unusual to use any track in Clopton (R. 64, 65).

Switchman Waymack, of the yard crew, had been in Clopton about half the time for twenty-four years (R. 71). On the former trial, he said that the exact movement made by road engineer Myrick was not unusual; that "it may happen ten times a month or it may happen fifteen times per month or it may not happen in two months" (R. 81, 82). On the occasion of the recent trial, he became very much confused; for instance, on direct examination: "They seldom ever backed down there if they have anywhere else to go" (R. 72). On cross-examination, he answers "Yes" to the question "You have seen on a number of occasions the road engine back into slow siding" (R. 79)? On redirect: "The usual move of the road engine is to go down in No. 1" etc. (R. 80). He very clearly got mixed up on the words "unusual" and "usual" (R. 79, 80, 82). His testimony is to be found on pages 71-2, 78-85 of the Record.

Fireman Wright of the road crew had been in Clopton Yard twelve or fifteen times. He had never seen this move made (R. 102).

C. D. Huband, a man of much experience in Clopton Yard (R. 87), said on direct examination that the move made by the road engine was not a usual move (R. 89) but was "very unusual" (R. 90). But on cross-examination, he said he had "many times" seen a road engine backing up slow siding to get to the water tank located thereon, and that he had seen a road engine so backing "on other occasions" (R. 97).

C. L. Parrish, who got into Clopton Yard two or three times a month (R. 106), said, so far as he could recall, he had never made such a back-up movement into slow siding (R. 107). He also said that on different nights the road engine got out of the way so the yard engine could classify the train, by going into different tracks (R. 107).

E. B. Orebaugh says that he always got in the clear by dropping into No. 1 track (R. 111). He had been employed

for three and one-half years, and had been in Clopton four or five times a month (R. 110). On cross-examination, he recalled occasions when he had backed into slow siding, and stated there was nothing unusual about using any track at Clopton (R. 111-2).

W. C. Moore, an engineer of long experience in Clopton, said he did not recall any occasion when he was engineer assigned to "First 209" that he had gotten into the clear out of the way of the yard engine by backing into slow siding (R. 114, 117); that he had gotten into the clear by dropping south into No. 1 (R. 114). But it developed that if the road engine with cars drops into the clear by going into No. 1, it then has frequently to back out into slow siding (R. 115). Mr. Moore had seen other engines pushing cars, backing on slow siding, and on all the other tracks (R. 116).

Yardmaster Jones said that "time and again" he had seen this move made (R. 131).

Sergeants Angle (R. 144-5), Ferguson (R. 146-7) and English (R. 150) all had seen this move made on other occasions.

Car Inspector Crews, whose twenty-one years of service have been spent exclusively in the Richmond Yards (R. 175), was asked whether he had seen the road engine with cars attached thereto get into the clear by backing into slow siding. He replied: "Yes, sir. It happens real often". (R. 177).

Save for the fact that virtually every one of these witnesses and others said that in Clopton, every track is used one time or another, the above is all the evidence bearing on the alleged unusual movement.

Not a line of evidence was introduced to show for what class of employee this custom of not backing into slow siding, if it existed, did exist; or whether or not, if it existed, it arose for the protection of the general public traveling Clopton Road.

The plaintiff called to the stand eight practical railroad operators—engineers, firemen, conductors, brakemen and

switchmen. We asked seven of them the question whether the move made by the road engine with the three hopper cars from old belt line into No. 1 track, and then back into slow siding, was a use of the road engine in yard or road service—or a movement made in yard or road service. Each replied that it was a use or movement in road service (R. 40, 64, 79, 97, 104, 108, 117). On cross-examination of defendant's witness, Yardmaster Jones, the question was put to him. He answered, road service (R. 142). The question was put to no other witness.

The line of demarcation, which was drawn by these men between the two types of service, was the line which divides "classifying" or "switching"—which in railroad parlance are movements in yard service, from other movements which are movements in road service. It is clear from their testimony that if an engine takes a car from one point in a yard, carries it to another and leaves it, then it is classifying or switching, and is being used in yard service. If, on the other hand, an engine moves "light", that is, the engine and tender alone, or with one or more cars to which it holds, so as to get out of the way in order to permit another engine to switch a car, then the former engine is being used in road service.

Plaintiff's witness Moore was one of the most intelligent of the witnesses, and in his redirect and recross examination (R. 117-9) this matter is more fully developed than at any other point. He said: " * * * in making that move the road crew is simply getting out of the way of the yard engine to do the switching". " 'Switching' is classifying cars, switching one out from between the other, and so on and so forth". Again on redirect examination:

"Q. Then if he cut off three cars on the hill and brought them down for the purpose of making a classification, was he doing the same thing that the yard engine would do if it cut off and carried a few cars down to back into a track?

A. Did he leave them there or bring them out with him?

Q. Did he leave them there?

A. When he backed into the clear, did he leave those cars?

Q. Assume that after some other cars had been put to his train he brought them out and then switched them back to his train.

A. I see no difference there whether he had cars or a light engine. He was simply getting out of the way with what was necessary to hold to."

On recross:

"Q. * * * does an engine which simply takes with it certain cars, in order to clear the way for another engine to classify the train and then the first engine which had gotten into the clear brings its cars back, engage in shifting work?

A. No, sir.

Q. And is not engaged in shifting work whether its primary purpose for being there is road purpose or yard purpose, is it?

A. No, sir. *It would be impossible for the switch engine to do this switching with the road engine attached to the train. He has got to get out of the way.*" (Italics supplied).

The same thought came out in plaintiff's cross-examination of Yardmaster Jones (R. 142):

"Q. In other words, if they had, besides backing up the three cars—the road engine—had left those three cars there in slow siding and had slipped on up the hill and helped the yard engine in making up the train by putting the Florida car in the right place, they would have gone over the line, so to speak and would have been entitled to yard service?

A. Yes."

Engineer Myrick (R. 41) and Brakeman Dickens (R. 67, 68) also make it clear that a movement of an engine and

cars to clear the way for another engine to shift, is a road movement, but if an engine sets off a car and leaves it, the movement is in yard service (R. 41, 66).

It even appears that this test is adopted in the agreement between the company and the Unions. It is brought out clearly by Dickens (R. 66) and by Yardmaster Jones (R. 142) that if members of a road crew do any switching or yard work, they are entitled not only to road pay but also to a full day's yard pay. But all witnesses who mention the matter are agreed that nothing was here done which entitled the road crew to yard pay. The same thought is touched on by Waymack (R. 79) and cryptically by Huband, who said (R. 97): "It is a movement in road service to avoid paying a yard crew day".

Perhaps Dickens (R. 64), Wright (R. 104) and Parrish (R. 108) covered the subject in a word. Dickens said: "It was road service made within the yard".

All through this litigation plaintiff has claimed that an unlighted yard is a badge of negligence. A stipulation, hereafter referred to, (R. 149) fully covers the extent to which the practice of lighting has gone. Only some of the largest yards are lighted. Some smaller yards in which a shop or warehouse is located, have outside lights for the purposes of the shop or warehouse. No yard of the size and character of Clopton is lighted.

The experience and views of the men who have to work in the yards is instructive. Generally those who have to work much of the time on the ground, such as brakemen and switchmen, find the overhead lights confusing; those who stay mostly on the equipment like overhead lights. Two engineers, Myrick (R. 42) and Moore (R. 116) like the lighted yards. A fireman, Wright, (R. 104-5) does not like them. He finds at certain points they blind, and make signals more difficult to read. Parrish, a conductor, likes them (R. 108). Huband, a conductor, has had little experience in lighted yards (R. 94). He summarizes much of the pros and cons by saying that in a lighted yard you can see a person

further, but the signals are harder to read (R. 95). Orebaugh, a conductor, likes them in some yards, not in others (R. 112). King, a switchman, (R. 168) and Elkie, a conductor, (R. 165) do not like them because of difficulty in reading signals. Dickens and Waymack, a brakeman and switchman, respectively, do not like the overhead lights (R. 62, 85). They blind at points (R. 65), and in moving from a darker point to a brighter one, it takes the eyes a few moments to adjust themselves. The last point is the reason Linton, an engineer, does not like lighted yards (R. 164).

Three of these men find lights help; six find they hinder; two are noncommittal.

Switchman Waymack had a recollection of a bulletin promulgated by the company which required that a train approaching an *unprotected* public crossing must come to a full stop, and some person must from the road then flag the train across (R. 72-73). On cross-examination, however, he testified that the bulletin has no application to a crossing already blocked by a standing train, and did not require, under the circumstances existing in the instant case, that the road engine stop and wait to be flagged over Clopton Road (R. 75-6).

Conductor Huband testified to a rule, somewhat similar (R. 90-1). This turned out to be Rule 103 from the company's Rule Book reading as follows (R. 96):

“When cars are pushed by an engine, except in shifting or making up trains in yards, a trainman must take a conspicuous position in the front of the leading car and when shifting over public crossings at grade, not protected by a watchman, a member of the crew must protect the crossing”.

Huband testified that if the road crossing was blocked by cars standing on one track, and an engine on another track was about to push cars over the crossing, and a brakeman with a lantern was riding on the lead end of the back-up movement, proper protection is given. He says it is “a

proper move" and "He had properly taken care of that crossing" (R. 96).

Plaintiff introduced Rule 24 from the company's Rule Book reading as follows (R. 101):

"When cars are pushed by an engine, except when shifting or making up trains in a yard, a white light must be displayed on the front end of the leading car by night."

The Rule Book contains a demonstrative diagram (R. 101) showing a lantern sitting on the end of the walkway which runs on top a box car, from end to end. On a hopper car which is open, there is no top or walkway, there is only a three-inch flange.

Dickens, with a lantern, was on the lead end.

The stipulation (R. 150) shows the practical construction placed on this rule—it applies to main line operations alone. The stipulation provides in part:

"When cars are thus pushed" (i. e. in yards), "it is not the practice of the railroads to place on the lead end of the movement a headlight similar to that carried by a locomotive, or otherwise to light the lead end of the back-up movement. Sometimes for some special purpose a man carrying a lantern may ride on the lead end of the movement."

Plaintiff introduced evidence from a section foreman showing that the clearance between tracks in Clopton Yard is 7' 11½"; that if ordinary freight cars are on each track, the distance between them is 4' 3½"; and a hopper car projects out 4" more than does an ordinary car (R. 50). On cross-examination, it was shown that this clearance was standard to the Coast Line system (R. 52).

The parties entered into a stipulation (R. 148-50) which sets forth that in practice, while some of the largest railroad yards of the country are lighted by overhead lights, "no yard of the size and character of Clopton" is so lighted; that when cars are pushed by a locomotive in a yard at

night, no headlight or other light is placed on the lead end of the back-up movement; and a locomotive equipped with a headlight for road service, but not equipped for yard service, which brings cars into a yard, is permitted to make such movement as may be necessary or convenient to get the road engine and cars adjacent thereto out of the way, so that the yard engine may do the necessary classifying and switching work.

QUESTIONS INVOLVED

Now that the writ of certiorari has been granted, the questions involved are:

1. Whether the plaintiff should have been permitted to amend her complaint more than three years after the cause of action arose, by alleging a violation of the Boiler Inspection Act.
2. Whether there was sufficient evidence to support a verdict in favor of plaintiff, and hence whether the motions of defendant for a directed verdict and for judgment notwithstanding the verdict should have been sustained.
3. Whether there was sufficient evidence of common law negligence (other than evidence of an unprecedented movement) to permit that question to go to the jury.
4. Whether there was any evidence tending to show that an act of common law negligence, if any, had causal connection with the injuries and death of Tiller.
5. Whether there was any evidence of a violation of the Boiler Inspection Act.
6. Whether there was any evidence tending to show that a violation of the Boiler Inspection Act, if any, had causal connection with the injuries and death of Tiller.
7. Whether Plaintiff's Exhibit No. 3 (R. 193-4), the report to the Virginia State Corporation Commission, should have been admitted in evidence.
8. Whether there was sufficient evidence of an unexpected or unprecedented movement, or departure from a general

practice in moving cars, to demand that a special warning of the movement be given Tiller.

9. If such warning was required, whether, as a matter of law, it was not given.

10. Whether, if there was sufficient evidence to take the question of an unexpected or unprecedented movement to the jury, the District Court correctly charged the jury on that phase of the case, and whether it should not have included in the charge that the alleged custom must have been established for the benefit of that class of employee to which decedent belonged.

11. Whether the District Court should not have charged that the road engine was engaged in "road service" and not in "yard service".

12. Whether the District Court should not have charged that no applicable statute or regulation imposed on defendant the duty to place a light of any kind on the lead end of a car or cars that are being pushed by a locomotive in a yard in the nighttime.

13. Whether the District Court should not have charged that such matters as the clearance between tracks and other engineering questions are left to the decision of the railroad and are not reviewable by the jury.

14. Whether the jury should have been instructed to disregard defendant's Rule 103.

15. Whether the jury should have been instructed to disregard defendant's Rule 24.

16. If one or more of several issues is erroneously submitted to the jury, whether a general verdict can be sustained.

The District Court decided the first fifteen questions against defendant. It did not have the sixteenth before it. The Circuit Court of Appeals decided questions numbered 6, 8 and 16 in favor of defendant; it did not pass upon those numbered 1, 5, 9 and 11; the other questions it decided against defendant.

ARGUMENT

1. *The Amendment of the Complaint should not have been Permitted.*

We have pointed out that the amendment was made more than three years after the cause of action arose. The amendment asserted a new cause of action, which could not be injected after the lapse of three years. Of this point, the Circuit Court of Appeals said:

“We do not need to consider this question in the view we take of the subsequent developments of the case.”

a. The Amendment Asserts a New Cause of Action

Prior to the New Federal Rules, an amendment which set up a new cause of action, a new or different state of facts, or sought a departure from law to law, did not relate back, and if the period of limitation had run, it was barred.

The fundamental authority of this question is *Union Pacific Railway Company v. Wyler*, 158 U. S. 285, 39 L. Ed. 983, 15 S. Ct. 877. That was an action for personal injuries sustained in Kansas. The original pleading alleged as negligence that the defendant employed a fellow servant known by it to be unfit and incompetent, and the action was brought in Missouri under the general law of master and servant. After the limitation period had run, it was sought to amend by pleading the negligence of the fellow servant under a Kansas Statute. The court declined to permit the amendment, saying (p. 295):

“A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow servant, then the averment of

negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas Statute, it was a departure from law to law".

This case has been followed in many decisions, or it has been distinguished, so that it is safe to say that if an amendment merely expands or amplifies what was alleged in support of the cause of action first asserted, it relates back to the commencement of the action and is not affected by the intervening lapse of time. But if it introduces a new or different cause of action, or new and additional occurrences, it is the equivalent of a new suit as to which the running of the limitation is not arrested (*S. A. L. Ry. Co. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 S. Ct. 567; *Missouri etc. Ry Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 S. Ct. 135; *N. Y. Central R. Co. v. Kinney*, 260 U. S. 340, 67 L. Ed. 299, 43 S. Ct. 123).

A number of the earlier decisions are gathered up in *B. & O. S. W. R. Co. v. Carroll*, 280 U. S. 491, 74 L. Ed. 566, 50 S. Ct. 182. There, suit was brought by an injured employee on the theory that the state law applied, and he recovered. The appellate court, however, reversed the case, holding that the federal law applied. While appeal was pending, the employee died and, after the period of limitation had run, it was sought to amend so as to recover not only for loss and injury sustained by the employee during his lifetime, but also for loss resulting from his death. On the trial of the case these two separate matters went to the jury, which rendered a single verdict. On appeal this verdict was set aside. The Supreme Court made reference to the *Wulf* and the *Kinney Cases*, *supra*, as follows (p. 494):

"Each of these decisions proceeds upon the ground that the amendment did not set up any different state

of facts as the ground of action, and therefore it related back to the beginning of the action. In the *Kinney* case, it was pointed out that the original declaration was consistent with the wrong under either state or federal law, as the facts might turn out; and that the acts constituting the tort were the same, which ever law gave them that effect.

"But here two distinct causes of action are involved, one for the loss and suffering of the injured person while he lived, and another for the pecuniary loss to the beneficiaries named in the act as a result of his death".

It will not be inappropriate again to point out that in the instant case the original complaint is consistent with a wrong under the Federal Employers' Liability Act only, whereas in the amendment new and additional facts are sought to be brought in, in order to allege a case under the Boiler Inspection Act.

A pertinent case is *Clark v. Gulf, etc. R. Co.*, 132 Miss. 627, 97 S 185. Mississippi had a statute which made proof of injury inflicted by the running of cars, etc., *prima facie* evidence of want of reasonable skill and care, and in an earlier Mississippi case it had been held that it was not necessary to allege negligence. In the Clark case the original pleading did not allege negligence, and it was sought to amend by alleging an act of negligence. This amendment was not permitted. The instant case presents the reverse picture. The original complaint alleges specific acts of negligence, and it is sought to amend by alleging a mandatory, statutory duty which has no reference to negligence.

Rule 15 (c) of the New Federal Rules gathered these old principles together in broad and liberal fashion as follows:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Cases decided under the new rules demonstrate that this rule is primarily a codification of the old law, although whether there be "a departure from law to law" is now relatively unimportant, the vital question still being whether the amendment seeks to allege a new state of facts. Instructive of these views are the following cases:

In *L. E. Whitham Construction Co. v. Remer*, 105 F. (2d) 371, plaintiff was severely injured by a blast of dynamite when drilling a hole in rock and died a few hours thereafter. Suit was brought by his administrator for the benefit of his wife under an Oklahoma Statute. Another statute provided that action should survive to the administrator for the benefit of the estate. After the two-year limitation had expired the complaint was amended and a second count was added claiming funeral expenses and a third count for the suffering of the deceased up to the time of his death. The Circuit Court of Appeals held that the allowance of the amendments was error.

The court discussed Rule 15 (c) and said:

"Counsel for plaintiff contend that under this rule the amendment which added the second and third causes of action to the petition relates back to the date of the filing of the original petition. We are of the opinion that the rule is not applicable where the amendment introduces a different and additional claim or cause of action.

"Here, the original cause of action was brought by plaintiff as administrator for the benefit of the surviving wife, while the second and third causes of action were brought by the administrator for the benefit of Remer's estate. It follows that the second and third causes of action were barred by the statute of limitations."

In *Michelson v. Penney*, 135 F. (2d) 409, it is clearly brought out that Rule 15 (c) is, in effect, declaratory of the law as it has long existed. There it is said (p. 417):

"The amended and supplementary complaint merely made specific what had already been alleged generally;

the cause of action was not changed; and relation back under Federal Rules of Civil Procedure, rule 15 (c), *and the earlier law it codifies, therefore followed*". (Italics supplied).

In *Schram v. Poole*, 97 F. (2d) 566, a receiver of an insolvent bank within the required time filed suit against a guardian to recover assessments against bank stock of the ward's estate. After the limitation period had run, he sought to amend in order to join the ward as a defendant. This the court decided to permit, saying (p. 572) :

"We think such an amendment would not relate back, however, but would be in effect the commencement of a new suit".

Rule 15 (c) is quoted in *Owen v. Paramount Pictures*, 41 F. Supp. 557, 561, and of it the court says:

"Under this rule, unless there is a *substantial change* from the claim as originally alleged (as in *L. E. Whitham Const. Co. v. Remer*, 10 Cir. 1939, 105 F. 2d 371) defendant cannot contend that he is taken by surprise or is prejudiced because he has known the facts from the beginning. The amendment will therefore relate back to the commencement of the action and is not barred by the statute". (Italics supplied)

A most instructive case is *Delaware & Hudson v. Jennings*, 64 F. (2d) 531, which antedates the New Rules. The plaintiffs alleged that they were injured some distance from a grade crossing while lawfully crossing defendant's tracks. The proof showed that they were injured at the crossing and the verdict in favor of plaintiff was set aside because of a variance. After the statutory period had run, the plaintiffs were permitted to amend by alleging that they were injured at the crossing and recovered. The defendant contended that the amended complaint set up a new cause of action, since the place of the accident was of primary

importance because it determined the degree of care to which the plaintiff was entitled, and, as the amendment changed the place, and changed the duty, it changed the action. With this contention, the appellate court agreed, saying (p. 533):

"As the plaintiffs by amendment set up a new ground of action and thereby charged the defendant with a new liability after the two year limitation, we are forced to hold they cannot prevail on the present pleadings and that, in consequence, the judgment in their favor must be reversed."

In *White v. Holland Furnace Co., Inc.*, 31 F. Supp. 32, the claim stated in the amendment was, according to the court, "based upon the same facts set forth in the original petition," and it accordingly permitted the amendment, saying,

"The emphasis of the courts has been shifted from a theory of law as the cause of action, to the specified conduct of the defendant upon which the plaintiff tries to enforce his claim. * * * To give effect to Rule 15 (c) * * *, the Court should allow an amendment of a pleading where the factual situation was not changed though a different theory of recovery is presented."

These principles are of easy application to the instant case. The cause of action or "specified conduct of the defendant" set up in the original complaint is acts of common law negligence. Under it, proof of negligence is required (*Delaware etc. R. R. v. Koske*, 279 U. S. 7, 73 L. Ed. 518, 49 S. Ct. 202; *Tiller v. A. C. L. R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967). The new cause of action, the new "specified conduct of the defendant", i. e. the violation of a statutory duty, requires no proof of negligence, for in relation to it the defendant stands in the position of an insurer (*Southern Ry. Co. v. Lunsford*, 297 U. S. 398, 80 L. Ed. 741, 56 S. Ct. 504; *Lilly v. Grand Trunk etc. R. Co.*, 317 U. S. 481, 87 L. Ed. 411, 63 S. Ct. 347, 45 U. S. C. A. 23, note 7).

It was pointed out in *B. & O. S. W. R. Co. v. Carroll, supra*, that the amendment related back only in the event the original pleading is broad enough to include not only the original, but also the new cause of action. Certainly one who confines his case to a claim for negligence under the Employers' Liability Act, does not allege a case covering the violation of a statutory duty under the Boiler Inspection Act.

Delaware v. Hudson & Jennings, supra, and *Clark v. Gulf etc. R. Co., supra*, are peculiarly apt. In the former, the amendment would have changed the degree of care to which plaintiff was entitled; it would have changed the duty resting on the defendant. In the latter, plaintiff did not allege negligence; he alleged the violation of a statutory duty, which raised a *prima facie* presumption in his favor. He could not amend by alleging negligence, for by so doing, he claimed a different right and asserted a different duty. Here, under the allegations of the original complaint, the plaintiff was entitled to and the defendant owed the duty of giving ordinary care. Under the amendment, plaintiff was entitled to absolute protection and the defendant had all the duties of an insurer.

If the cause of action be not changed, if the amendment be but an expansion or amplification of the original cause of action, not only is the degree of care and the duty the same, but the same general defenses are available. As a matter of defense, in mitigation of damages, to the original cause of action, the defendant had contributory negligence available. But the defense of contributory negligence is not available in a case arising out of the Safety Appliance Act, 45 U. S. C. A. 1, or the Boiler Inspection Act. (*Chicago, G. W. R. Co. v. Schendel*, 267 U. S. 287, 69 L. Ed. 614, 45 S. Ct. 302; *B. & O. R. Co. v. Groeger*, 266 U. S. 521, 69 L. Ed. 419, 45 S. Ct. 169).

The amendment alleges a new and different state of facts—i. e. failure to equip the locomotive with proper headlights,—not to have a light on the lead car of the back-up movement as alleged in the original complaint.

The amendment departs from law to law in substantive matters—from an action for violation of a common law duty to an action for a violation of a statutory duty imposed by the Boiler Inspection Act, each of which is brought under the jurisdictional and procedural provisions of the Employers' Liability Act.

In like manner, the amendment asserts a claim which arises out of *conduct*, transaction or occurrence not alleged in the original complaint.

Finally, on this phase, we call attention to *Maty v. Grasselli Chemical Co.*, 303 U. S. 197, 82 L. Ed. 745, 58 S. Ct. 507, wherein an amendment was allowed after the period of limitation had run. In the Court's opinion by Mr. Justice Black, there is given a test for this matter, which we believe to be about as accurate as can be stated. In speaking of the original and amended complaints, it was said:

“They referred to the same kind of employment, the same general place of employment, the same injury and the same negligence.”

Apply this test to the original and amended complaints in the instant case. They refer to the same employment; they refer to the same place of employment; and they refer to the same injury. But they do not refer to the same negligence. The former refers to alleged failures to do certain acts, or to refrain from doing certain acts, which a reasonable man (railroad) under similar circumstances would have done, or refrained from doing, as the case may be, and as to which the defendant had available to it the defense of contributing negligence, if negligence should be proved. The latter refers to an entirely different type of alleged wrong—a failure to perform a statutory duty, for which there is no defense of any kind. If “negligence” be a proper word to describe a dereliction of the type alleged in the amendment, the “negligence” there alleged is different in nature, degree and effect from that alleged in the original complaint.

b. Suit on the New Cause of Action was Barred

The Safety Appliance Act and the Boiler Inspection Act contain no procedural provisions. One desiring to sue for a violation of a statutory duty imposed by either of those acts may bring his action under the procedural provisions of the Employers' Liability Act (*Moore v. C. & O. R. Co.*, 291 U. S. 205, 78 L. Ed. 755, 54 S. Ct. 402; *Lilly v. Grand Trunk Western Ry. Co.*, *supra*). That is what plaintiff here seeks to do. But suit on such a cause of action must be brought within three years, for that is the limitation prescribed by the Act of August 11, 1939, c. 685, Sec. 2, amending section 56 (45 U. S. C. A. 56) of the Federal Employers' Liability Act.

The very jurisdiction of the Federal District Court depends on suit being brought within the prescribed time for the limitation is not simply one upon the remedy, but it goes to the very right of action itself. (*Bell v. Wabash R. Co.*, 58 F. (2d) 569; *A. C. L. R. R. Co. v. Burnett*, 239 U. S. 199, 60 L. Ed. 226, 36 S. Ct. 75; *Rademaker v. Flynn Export Co.*, 17 F. (2d) 15, *Flynn v. N. Y. N. H. & H. R. Co.*, 283 U. S. 53, 75 L. Ed. 837, 51 S. Ct. 357).

The limitation in a death case runs from the date of death and not from the date of the appointment of the personal representative. (*Reading Co. v. Koons*, 271 U. S. 58, 70 L. Ed. 835, 46 S. Ct. 405).

2. The Verdict of the Jury and Judgment of the District Court were without Evidence to support Them.

Under this heading, we discuss the questions numbered 2, 3, 4, 5, and 6, all of which relate to the sufficiency of the evidence. Our position is that there was not sufficient evidence to support a verdict, and hence our motions for a directed verdict and a judgment notwithstanding the verdict should have been sustained. Those motions went to the whole case. We also at the proper time divided them up into their component parts, i. e. the sufficiency of the evidence to estab-

lish negligence, or, if negligence existed, to establish causal connection; or to establish a violation of the Boiler Inspection Act, or, if such a violation existed, to establish causal connection.

Our argument on these matters is primarily the factual statement heretofore made. What remains to be said is divided into two parts—one relating to alleged acts of common law negligence, or the Employer's Liability Act phase of the case; the other relating to alleged violation of statutory duty, or the Boiler Inspection Act phase of the case. These, we discuss separately, for the evidence is different, the character of proof required of plaintiff is different and the defendant's duty was different.

a. The Evidence does not establish Negligence or Proximate Cause

The evidence in this case presents no real conflict. There can be no dispute over the movements of the trains; over the fact that the north end of the cut from Byrd Street was standing still while the road engine backed up slow siding; over the question whether Tiller was holding a lighted flashlight. Some say that a back-up movement by the road engine on slow siding was unusual, others that it was not unusual. But this really presents no conflict in the testimony, because such statements are but conclusions. Even on this feature, there is no conflict, for when the witnesses turned to facts, it quickly developed that most of them had seen slow siding so used, and all said that no routine was followed—on different nights different tracks were used. The question is, can any inference of negligence be drawn from the facts proved in evidence, or must certain additional facts be added by speculation and conjecture before that inference can be drawn?

The former decision of the Supreme Court in this case (*Tiller v. A. C. L. R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967) does not relieve one who alleges negligence from the duty of proving it. The latest

statement of the Supreme Court is that recovery cannot be had under the Employer's Liability Act, unless negligence be proved, and unless it be proved that such negligence is the proximate cause in whole or part of the accident, and the decision of the Supreme Court in this case is cited (*Tennant v. Peoria etc. R. Co.*, 321 U. S. 29, 88 L. Ed. 322, 324, 64 S. Ct. 392). And in its decision in the instant case, the Supreme Court reiterated the time honored statement that negligence is "the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done".

In many types of cases, the common experience of men furnishes the jury with a guide—they know, or are presumed to know, out of the book of human experience, what a reasonable man would do under circumstances known generally to men. But when those circumstances lie in the field of some technical endeavor, the jury has no guide from human experience, the plaintiff must by evidence prove what reasonable practices in that field may be, and thus having given to the jury a guide, it must be shown that the defendant violated it. We do not permit the jury to guess at the standard, anymore than we permit speculation on the question whether the standard has been breached. A doctor is charged with negligently performing an operation. We do not permit a plaintiff simply to show what the doctor did, and go to a jury on the gamble that they, as uninformed laymen, may think the doctor should have done otherwise. The plaintiff is required also to show what may be approved medical practices, and that the defendant's actions violated them.

The defendant here is engaged in an extremely technical line of business. Amid the circumstances of this case are the operation of a freight yard, the mysteries of railroad traffic, the operation of a great railroad system. The ordinary experiences of men furnish no guide by which they can test the reasonableness of many of these railroad prac-

tices. What should be the clearance between tracks? Should yards be lighted? Should trains be classified in this manner or that? These are questions which no jury can pass upon, unless they be furnished with evidence. That mythical person whom we term the "reasonable and prudent man" becomes in such case "the reasonable and prudent railroad" (*Sadowski v. Long I. R. Co.*, 41 N. Y. S. (2d) 611), and by evidence the jury must be introduced to him.

The Supreme Court has recently had occasion, in *Brady v. Southern R. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232, to comment on the necessity of a plaintiff making this introduction in a suit under the Employer's Liability Act. One of the specific charges of negligence was that the defendant railroad company had failed "to provide a light or other warning to indicate the dangerous position of the derailer", which was closed to prevent cars from drifting from a storage track on to the main line. No evidence of approved railroad practice in this respect was introduced. The trial court permitted the case to go to the jury which brought in a \$20,000.00 verdict. The Supreme Court of North Carolina reversed, because there was no evidence to support the verdict. In affirming that reversal, the Supreme Court of the United States said:

"As to the light, it is nowhere shown that it was customary or even desirable in the operation of this or any other railroad to equip derailleurs with such a signal. Apparently lights on a derailer are not used on storage tracks where, as at the place of the accident, an automatic block system functions."

Beamer v. Virginian Ry. Co., 181 Va. 650, 26 S. E. (2d) 43, recently decided, was also a Liability Act Case. There the Court comments on the effect of expert testimony, and the defendant railroad having acted in accordance with approved practices, the action of the trial court in setting aside a verdict against it and entering judgment, was affirmed.

Other cases commenting on the necessity of showing approved practices are *Delaware, etc. R. Co. v. Koske*, 279 U. S. 7, 73 L. Ed. 578, 49 S. Ct. 202; *Sadowski v. Long I. R. Co., supra*.

We point out that the plaintiff introduced not a line of evidence to show what is "customary or even desirable" in Clopton Yard or any other yard of this or any other railroad. The only evidence on this subject is the stipulation (R. 148, *et seq.*) introduced by defendant, showing some of the practices of the great roads in the southeast. It is not even contended that defendant violated a single one of those practices.

The amended complaint asserts six specific acts of negligence. We list them, with brief comment.

(1) *Failure to keep a proper lookout.* Admittedly, brakeman Dickens was on the lead end of the movement, giving the back-up signal—a circular movement—with a lighted lantern. We do not mean to intimate that he was there for the purpose of maintaining a lookout for men working in the yard, for he says his only reason for riding the car was to warn highway traffic approaching from the west. Be the reason what it may, he was there, with his lantern, for all men to see.

Again, there is no evidence here tending to show whether it is reasonable to expect that on the millions of back-up movements which take place in the yards (mostly unlighted) of this country, there be posted a special lookout. Is it "customary or even desirable in the operation of this or any other railroad" to place a lookout for the men working in the yards of the country—for men who know that tracks are in continuous use? What are approved railroad practices? The evidence is silent.

(2) *Failure to give proper signals of the approach of the cars.* Both the engineer and the fireman, who were operating the road engine—witnesses for the plaintiff—testify that the automatic bell was ringing. No witness contradicts them. There is not a scintilla of evidence that "it is cus-

tomary or even desirable" that another type of warning be given. And finally, no duty rests upon a railroad to give warning to men working in a yard that cars are being moved, because this but adds to the confusion. (*Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758, 12 S. Ct. 835).

(3) *Failure to have the head car lighted.* Admittedly Dickens was on the lead end of the head car with a lighted lantern when Tiller was struck, or up to a few feet of the point where he was struck. Here again, as in the two preceding instances, plaintiff herself, has proved by her own witnesses, that her allegation is untrue. And on this occasion the stipulation (R. 150) affirmatively establishes that on a movement of this kind it is not customary to light the head car. Surely out of their imagination a jury cannot say that a universal practice of railroads is a practice in which no reasonable and prudent railroad will engage!

We have pointed out heretofore that the stipulation shows that the practical construction placed upon the defendant's Rule 24 (R. 101) confines that rule to main line operations. If the stipulation might be disregarded, and if it could be surmised that the rule requires a lantern to be placed, as shown in the diagram, we have pointed out that it was physically impossible to place the lantern in that manner on a hopper car. Despite this, if a lantern be still required, Dickens had the lantern there. To be sure, it was not in the exact center. If this last fact be negligence, the plaintiff can make no capital of it, for he must prove the negligence to be the proximate cause, and no man could entertain the belief that had Tiller been standing on or near slow siding, he would have seen a stationary lantern on the center of the end, but would not have seen a waving lantern at the side of the end.

"The weight of the evidence under the Employer's Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury". (*Brady v. Southern R. Co.*, *supra*.)

4. *Failure to warn deceased of a hitherto unprecedented and unexpected change in the manner of shifting cars.* We refer to the factual statement, beginning on page 13 hereof. Two witnesses (Dickens and Wright) who had seldom been in Clopton prior to the accident, said that prior thereto, they had never seen the back-up movement on slow siding. One witness (Parrish) who was in Clopton two or three or four times a month had never seen it made. Two witnesses (Myrick and Orebaugh), of no great experience in Clopton, had never themselves made the movement. Three policemen (Angle, Ferguson and English), two of whom at one time alternated with Tiller in riding "First 209" (R. 145, 150), and one of whom had on occasions ridden it with Tiller (R. 144), had seen the move made. One witness of long experience in Clopton (Moore) had never himself made the movement, but he had seen other engines backing on slow siding, and it was developed in his testimony that frequently, if the road engine gets in the clear by dropping into No. 1 track, it must back out on to that track and slow siding. One witness of long experience (Huband) says the movement was very unusual, but "many times" had he seen a back-up movement on slow siding to enable an engine to get water, and "on other occasions" had he seen such a movement. One witness of long experience (Waymack) became so confused on the meaning of the word "unusual" that his testimony, which on the first trial was a clear negation of the allegation, amounts to nothing on this occasion—on direct examination, he says one thing, on cross, another. Two witnesses of long experience (Jones and Crews) say the movement is made "time and again" or "real often". All witnesses say there is nothing unusual about using any track at Clopton. This certainly cannot be considered as proof of an unusual movement. Furthermore we show later that the custom must be shown to have existed for the benefit of the class of employee to which the injured man belonged. There is not a line of evidence in this case so showing.

This matter is further discussed on pages 19 and 20 of our brief in opposition to the petition for the writ of certiorari, to which we respectfully make reference.

(5) *Failure to operate the train, engine and cars in a careful and prudent manner under the circumstances then and there existing.* There is not even a scintilla of evidence to support this allegation. The bell was ringing, the train was moving at four or five miles an hour in a manner in strict accord with approved railroad practices, as shown by the stipulation, and a man with a lighted lantern was on the lead end of the movement. For what more can anyone ask, much less, have a right to expect?

(6) *Failure to furnish deceased a reasonably safe place to work.* Here the evidence falls down hopelessly. The only two physical features of the yard that, from the evidence introduced by plaintiff, might be expected to be questioned, is the fact that the yard is not lighted, and that the clearance between tracks is that which the evidence shows it to be. Each of these is an engineering question, and as we show later is a matter for the determination of the railroad, not for the jury. But more important at this point is the fact that the stipulation shows that no yard of the size and character of Clopton is lighted, and the stipulation and oral evidence show lighting of yards is still in an experimental state. As to the spacing between tracks, the evidence shows the tracks in Clopton have the standard Coast Line clearance, and there is not a line of evidence tending to show that is not a reasonable clearance.

These six allegations of negligence are introduced by the allegation that defendant "knew or in the exercise of ordinary care should have known full well, the position of the decedent and the work in which he was engaged." The defendant did have knowledge that Tiller was assigned to guard "First 209," and was somewhere about his duties, but beyond that it had no knowledge and can be charged with no knowledge of his location.

Part of the theory of the plaintiff is that Tiller was

standing on or close to slow siding, just north of Clopton Road. This part is not inconsistent with the facts, as shown in evidence. But the theory advanced by Superintendent Murchison, in his letter of April 4, 1940, that Tiller stepped down from the Byrd Street cars into the path of the road engine, and the theory set forth in the report of April 9, 1940, of the Conductor and Engineer of the road engine, that Tiller got off the Byrd Street cars and backed into the back-up movement, are likewise not inconsistent with the evidence. We might state many other theories, each of which satisfies every known fact, as well as any other. The trouble here is that there are not enough known facts to warrant the drawing of a reasonable inference, and negligence cannot be presumed from the mere fact of an accident. (*Beamer v. Va. Ry. Co.*, *supra*; *Patton v. Texas P. R. Co.*, 279 U. S. 658, 45 L. Ed. 361, 21 S. Ct. 275).

No evidence establishes the theory that Tiller was standing on or close to slow siding, just north of Clopton Road, and no evidence establishes the theory that defendant should have expected him to be there rather than at another point in the yard. This evidence, if it establishes anything, establishes the fact that Tiller followed no routine; that one night he came to Clopton by one means, another night by another; that he had been seen doing his work all over Clopton, that sometimes he checked seals at Byrd Street, sometimes at Clopton, sometimes in between.

This is not such a case as was *Tennant v. Peoria, etc. R. Co.*, *supra*. There, a switchman was killed by a backing engine, which had started without ringing its bell, and contrary to a rule of the company. Shortly before the engine began to back, the engineer saw the switchman walk to the rear end of the engine, and it was the duty of the switchman "to stay ahead of the engine as it moved back out of track B-28, protect it from other train movements, and attend to the switches." There was no direct evidence of the precise location of the switchman when killed, but there was "strong evidence that he was killed approxi-

mately at the point where the engine began this backward movement". And, in addition to all this, there was the presumption that he was at the place at which his assigned duties would place him. Here, on the other hand, no one saw Tiller. His assigned duties no more placed him on or near slow siding than they placed him at any other point in the yard, and the evidence shows that no man had any more reason to expect him to be there than at some other point.

The other part of the plaintiff's theory is that Tiller was flashing his flashlight on the seals of cars passing on southbound main line. This part is founded on the report to the State Corporation Commission and on that report alone. This record positively disproves that part of the theory. We know the cars on southbound main line were not moving, they were standing. We know Tiller was not holding a lighted flashlight, for men in position to see his light, if it was lighted, saw no light.

On the most favorable aspect of the case to the plaintiff, the report to the Corporation Commission would be admissible only as an admission against interest. But, when it is shown that its author knew none of the facts, did not correctly report the inferences given to him, and that no man in Clopton that night knows where Tiller was when he was hit or what he was doing, the weight of the report is less than a scintilla, it is nothing.

When this case was formerly before the Supreme Court, it accepted the theory of the plaintiff that Tiller was standing on or close to slow siding flashing his flashlight on the seals of cars passing on southbound main line. The Supreme Court said:

"Tiller was standing between two tracks in the respondent's switch yard. * * * Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track."

The record then was different from the record now. Then the District Court had sustained defendant's motion for a directed verdict at the conclusion of plaintiff's evidence. A part of that evidence was the report to the State Corporation Commission. As defendant introduced no evidence, it was not then shown that this report was imaginary. Now, however, on the present record, there is nothing to sustain the theory.

Not only must plaintiff prove negligence, she must likewise prove the act of negligence to be the proximate cause of the injury and death. This point we cannot discuss, because there is nothing in relation to which it can be considered. We mention it because some of the cases to which we are about to refer turn on speculation with reference to proximate cause, others on speculation with reference to negligence.

In *Atchison, etc., R. Co. v. Toops*, 281 U. S. 351, 74 L. Ed. 603, 50 S. Ct. 281, the body of a conductor, who was looking after the backward movement of box cars, was found under the wheels of the tender. It was alleged that his death was attributable to negligence in carrying out the kicking movement of the grain cars without signal and without placing a flagman or light on them.

Mr. Justice Stone, delivering the unanimous opinion of the court, said:

"But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361; *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; *St. Louis-San Francisco Ry. Co. v. Mills*, 271 U. S. 344, 347, 46 S. Ct. 520, 70

L. Ed. 979; *Chicago M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041; *New York Central Railroad Co. v. Ambrose*, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562, decided February 24, 1930."

In *Chicago, M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, 46 Sup. Ct. 564, the circumstantial evidence was far stronger than in the case at bar. It was the duty of Brakeman Coogan to go between the cars to couple the air hose. Near where his body was found there was a piece of pipe fastened to the cross ties by clamps and spikes. The left shoe which he wore at the time was scratched and showed a marked rounding impression. It was inferred that Coogan caught his foot under the pipe and a verdict for his administrator was approved by the trial court and the highest state court. The Supreme Court of the United States reversed the judgment and said:

"* * * Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed * * *."

In conclusion the court said:

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 524, 45 S. Ct. 169, 69 L. Ed. 419. When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. *Pauling v. United States*, 4 Cranch, 219, 221, 2 L. Ed. 601; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564; *St. L. & Iron Mtn. Ry. Co.*

v. *McWhirter*, *supra*, 282 (33 S. Ct. 858); *St. Louis-San Francisco Ry. v. Mills*, 271 U. S. 344, 46 S. Ct. 520, 70 L. Ed. 979, decided May 24, 1926."

In *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391, deceased was riding on the lead car of a string of cars being shunted into a spur track. He was knocked or fell from the car and was injured.

The Court said:

"We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Pleasants v. Fant*, 22 Wall. 116, 120, 121, 22 L. Ed. 780. And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning v. Cooley*, 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 660, 21 S. Ct. 275, 45 L. Ed. 361. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch v. Boston*, 101 U. S. 16, 18, 25 L. Ed. 980; *Barrett v. Virginian Ry. Co.*, 250 U. S. 473, 476, 39 S. Ct. 540, 63 L. Ed. 1092, and cases cited; *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. Ed. 958. The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned. *Schuylkill & D. Improvement & R. Company v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *Small Co. v. Lamborn &*

Co., 267 U. S. 248, 254, 45 S. Ct. 300, 69 L. Ed. 597; *Gunning v. Cooley, supra*; (C. C.) at pages 443-444 of 78 F.

"Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible. *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; *Gulf, etc., R. R. v. Wells*, 275 U. S. 455, 459, 48 S. Ct. 151, 72 L. Ed. 370; *New York C. R., Co. v. Ambrose, supra*; *Stevens v. The White City, supra*."

It is elementary law that where there are two or more causes which may have produced an accident, for some of which a defendant would be liable, and not for others, and it is just as probable that it resulted from one cause as another, there can be no recovery.

In the *Chamberlain Case, supra*, the Supreme Court of the United States said:

"We, therefore have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover."

The court cites a number of state and federal cases sustaining this principle, among them *Smith v. First National Bank of Westfield*, 99 Mass. 506, 97 Am. Dec. 59, from which it quotes with approval the following language:

"There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. * * *"

In *Stephens v. The White City*, 285 U. S. 195, 761 L. Ed. 699, 52 S. Ct. 347, the Court said:

“ * * * The evidence is consistent with an hypothesis that the tug was not negligent and with one that it was, and therefore has no tendency to establish either * * * ”

In *New York Central R. Co. v. Ambrose*, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562, an employee was found at the bottom of a grain bin in which a poisonous gas to kill insects had been put. The bin was uncovered, but there was no evidence showing who removed the top. The Court said:

“The utmost that can be said is that the accident may have resulted from one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough. * * * ”

For the Virginia authorities on this subject, see *C. & O. Ry. Co. v. Heath*, 103 Va. 64, 48 S. E. 508; *N. & W. Ry. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; and *C. & O. Ry. Co. v. Catlett*, 122 Va. 232, 94 S. E. 934.

The Supreme Court has recently decided two interesting cases that have reference to this point: *Brady v. Southern Ry. Co.*, *supra*, and *Tennant v. Peoria, etc. Ry. Co.*, *supra*.

In the *Brady Case* a brakeman was killed when cars being backed on a switch track passed over the wrong end of a derailer, which was closed so as to prevent cars from drifting out of the switch track and by reason thereof derailed. The jury found for the plaintiff, and the trial court entered judgment. The Supreme Court of North Carolina reversed for lack of evidence of negligence, and this action the Supreme Court affirmed. There were three claims of alleged negligence: *first*, that a light should have been put on the derailer—this the Court swept aside because there was no evidence that such a light was customary or desirable; *second*, that another employee had set the derailer without warning the decedent—this the Court rejected, for the evidence did not show who set it, and under the evidence, it was quite possible that the deceased, himself, had done

so—"it was mere speculation as to whether that negligence is chargeable to decedent or another"; *third*, the rail opposite the derailer was known to defendant to be defective—this the Court accepted; it said it was not the proximate cause, because it was not reasonable to expect that cars would pass over the wrong end of the derailer.

In the *Tennant Case* a switchman was killed in a yard by a back-up movement. The jury found for the plaintiff and the District Court entered judgment. The Circuit Court of Appeals held that judgment for the defendant should have been directed. The Supreme Court reversed and re-established the verdict. The evidence showed that the engineer had seen Tennant near the rear of the engine shortly before it backed, and that Tennant's duty required of him that he stay ahead of the engine as it backed. A company rule required that the engine bell be rung "when an engine is about to move", and there was *conflicting* evidence on the questions whether "this rule was for the benefit of crew members who presumably were aware of switching operations and as to whether it was a customary practice for the bell to be rung under such circumstances". The Circuit Court of Appeals had not questioned the fact that there was sufficient evidence to sustain a finding of negligence, but it held there was no evidence that the failure to ring the bell was the proximate cause of the death. The Supreme Court pointed out that physical facts showed Tennant to have been struck just as the back-up movement began—at the point his known duty required him to be. It accordingly held that the jury had before it evidence from which it might draw the inference of proximate cause.

In the *Brady Case*, the evidence did not contain proof of certain facts essential to support the findings of negligence and proximate cause—to sustain those findings those missing facts had to be supplied by conjecture and speculation. In the *Tennant Case* there was evidence of the essential facts, and the Supreme Court did again that which it has frequently done—it held that a verdict could not be set aside

because a Court felt another inference, drawn from the evidence, to be the "more reasonable".

In the *Brady Case*, the minority of the Court felt it was able from the record to point out evidence of two acts of negligence, and evidence of essential facts in the chain of causation. No person yet in this case has been able to put his finger on an act or omission of defendant, and say, "This is evidence of negligence." There is an entire lack of proof of facts essential to establish causation. No man can answer the question, where was Tiller and what was he doing, without, by speculation and conjecture, evolving out of thin air facts necessary to be supplied. From facts, the jury may draw inferences, but it cannot assume the facts.

The former decision of the Supreme Court in this case did not alter the law in these respects. In both the *Brady Case* and the *Tennant Case*, that former decision is cited in support of these principles. In referring to that decision, the Supreme Court of Appeals of Virginia said in *Beamer v. Virginian Ry. Co.*, *supra*:

"There is nothing new in the test in the Tiller case to determine when a case should go to the jury or when it should be withheld."

b. The Evidence does not establish a Violation of the Boiler Inspection Act or Proximate Cause.

The Circuit Court of Appeals did not pass upon the question whether the road engine was being used in road or yard service, when it backed north on slow-siding. It proceeded on the "assumption" that it was being used in yard service, and a violation of the Boiler Inspection Act, being thus assumed, it inquired whether that violation was a proximate cause of the injury and death. It found that causal connection did not exist.

Admittedly the road engine did not have on its rear a headlight. The rules and regulations of the Interstate Com-

merce Commission issued pursuant to the Boiler Inspection Act require a headlight on the rear of a "locomotive used in yard service between sunset and sunrise" (R. 22) and also of a "locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train or in making terminal movements" (R. 21).

If the road engine, as we contend, was being used in road service, no headlight was required on the rear, for the uncontradicted evidence is that this engine was not "regularly required to run backward for any portion of its trip." (Page 8 hereof). Again, the movement of the road engine was primarily to get out of the way, so that the yard engine might classify the train, and secondarily, to pick up that portion of its train which the yard engine would leave for it on southbound main line.

Plaintiff insists that the road engine was being used in "yard service". The evidence to which we have heretofore referred on pages 15-18, inc., hereof, shows conclusively that a road engine which brings cars into a yard, and then gets out of the way so as to permit a yard engine to classify the train, is being used in road service—whether its movement in getting out of the way is forward or backward.

The Court left to the jury the determination whether or not the engine was being used in "road" or "yard" service. This is a technical question. The jury could not make its own definition of those terms; it had to arrive at that definition from evidence. In the testimony of witnesses on this point, there is literally no conflict whatsoever. They all say the use was road service, and those who are called upon to explain what, in railroad parlance, road service is, agree *in toto*.

So far as we are aware, but one court in this country has had occasion to consider these terms, and nothing which we say here is inconsistent therewith. In 1932 the Circuit Court of Appeals for the Sixth Circuit decided *C. & O. Ry. Co. v. Wood*, 59 F. (2d) 1017. There a road engine had come

into the Ronceverte, W. Va. yards and was delivering into a spur track some cars which it had brought with it. Another engine, which for six months had been in those yards for the purpose of helping make up the train which the road engine was to take east, and which also acted as a pusher for that train to aid it to get it over the mountains, was backing light, to pick up a caboose in the yard for the purpose of adding it to the train. While so backing, it struck Wood. The Court held that this last mentioned engine was being used in yard service and said it

“was being used wholly within the yards for the purpose of building or making up the train.”

In commenting on the meaning of Rule 129 (b)—the road service rule—the Court said

“* * * rule 129 (b) applies to a locomotive making regular trips with a train from one point to another over the road and which is from necessity required to run backward for some portion of such trips.”

The Boiler Inspection Act permits rules relating to locomotives and tenders. It does not relate to other equipment. It is questionable, even if Rule 129 (b) otherwise applied, whether in this instance, the road engine was “running backward” within the meaning of the Rule. It was pushing cars. The Rule could scarcely be construed to mean that a road engine pushing cars must under these circumstances have a rear light, when that light would, of necessity, be obscured.

And that brings us immediately to the question of proximate cause. Is there any evidence to indicate that a failure to have a headlight on the rear of the tender was a proximate cause of the injuries and death? The evidence is undisputed. If there had been a headlight, it would have shone up against the rear of the adjacent hopper car, and light would have been diffused out to the sides and upward

—not directed up the track (page 8 hereof). If the plaintiff's conjecture be true and if Tiller was standing on or near slow siding, facing in such direction that he did not see Dickens' lantern bearing down on him, he could not have seen this diffused light. If he was ignorant of the back-up movement, and alighted from the Byrd Street cars in its path or backed into it, the same thing is true. If he was aware, as he may have been, of the back-up movement, and slipped, the absence of a rear headlight was no cause of any kind.

A violation of a Safety Appliance Act creates no cause of action unless it is the proximate cause of an injury. This is established law. (*Lang v. N. Y. Cent. R. Co.*, 225 U. S. 455, 65 L. Ed. 729, 41 S. Ct. 381; *Brady v. Terminal R. Assn.*, 303 U. S. 10, 82 L. Ed. 614, 58 S. Ct. 426; *Powell v. Waters*, 55 Ga. App. 307, 190 S. E. 615).

Plaintiff recognizes the strength of our position on this matter of proximate cause, and the failure of the evidence to establish causal connection between the absence of a rear headlight on the tender and the injuries and death of Sergeant Tiller. She, accordingly, attempts to rewrite the Rules and Regulations of the Interstate Commerce Commission, and contends that they require of a locomotive used in yard service, that it not only have a rear headlight, but that it refrain in the nighttime from pushing cars so as to obscure that headlight. To this contention, we have replied fully on pages 16 and 17 of our brief in opposition to the granting of the petition for certiorari, to which we now refer.

3. It was Error to admit in Evidence the Report to the State Corporation Commission of Virginia.

This report was introduced, over objection, in evidence on the first trial. On the first appeal to the Circuit Court of Appeals we called attention to its inadmissibility. As that court affirmed, there was no occasion for it to pass upon the question. It was not raised before the Supreme Court.

In express words the Constitution gives Congress the right to regulate commerce among the several states (Article I, sec. 8). And in *Gibbon v. Ogden*, 9 Wheat. 1, Chief Justice Marshall said that this power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." It is familiar law that when Congress has acted in a matter within its constitutional powers, all State enactments on the subject fall. (*Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169).

In *Northern Securities Company v. U. S.* 193 U. S. 197, 48 L. Ed. 679, 24 S. Ct. 436, Mr. Justice Harlan said:

"* * * So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce whether founded in wisdom or not, must be submitted to by all. * * *"

The Federal law (45 U. S. C. A. 38, 40) provides for monthly reports of accidents by railroad companies to the Interstate Commerce Commission and an investigation by the Commission, and then provides:

"§41 *Reports not Evidence in Suits for Damages:* Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

The Virginia Statute (Code sec. 3988) provides for monthly reports of accidents in the same words as the Federal law, but omits the provision of section 41, *supra*, providing that the reports shall not be used as evidence.

The report to the Virginia Commission was introduced in evidence over the objection and exception of the defendant. If it had been excluded, there would not have been

a scintilla of evidence before the court of the manner in which Tiller received the injuries complained of.

In the usual course of events the same factual statement would have been made to the Interstate Commerce Commission and the Virginia Commission, but it was brought out on cross examination that the clerk who made up the report to the Virginia Commission made an error in the report to that Commission in stating the facts positively instead of conjecturally as he had stated them to the Interstate Commerce Commission (R. 161).

We are here dealing with Federal enactments in a Federal Court, and it would be an anomaly if the State law, by omitting the provision that the report to it should be inadmissible, could thereby make such report admissible in a Federal court contrary to the expressed policy of Congress.

It is familiar law that State enactments on matters of interstate commerce fall when Congress speaks on the subject, and it can hardly be that the failure of a State to enact a provision of a Federal statute would result in the admission of evidence which the Federal statute expressly declares inadmissible. It is well settled that the law of the forum controls as to the admissibility of evidence. (15 C. J. S. p. 955.)

It is clear that Congress intended by section 41, *supra*, to make reports to the Interstate Commerce Commission confidential. Its purpose was two fold, namely, it wanted a frank statement of the cause of the accident from the carrier, and it did not want the carrier to be able to use the report as a self-serving declaration. To allow a State to circumvent the express intention of Congress by enacting a similar law and omit the provision that the report to it should not be used, would nullify the law.

The trend of Federal decisions is to make the provisions of all such acts of Congress uniform, absolute, and immutable. This is the "pattern" set forth in the recent decision in *Mid State Horticultural Co. Inc. v. Pennsylvania R. Co.*, decided November 22, 1943, 319 U. S. 735,

87 L. Ed. 1695, 64 S. Ct. 128, in which an agreement by a shipper not to plead the statute of limitations in an action by a carrier for freight charges was declared illegal. The Court said:

“* * * We think petitioner's position must be sustained. In short this is that the agreement is invalid as being contrary to the intent and effect of the section and the Act.”

And further in the opinion the Court says:

“* * * Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standard is required.” Citing *L. & N. R. Co. v. Maxwell*, 237 U. S. 94, 87 L. Ed. 1695, 35 S. Ct. 494.

See also *Napier v. A. C. L. R. Co.*, 272 U. S. 605, 71 L. Ed. 432, 47 S. Ct. 207.

We submit that the clear intent of Congress was violated by the admission of the report to the Virginia Commission.

4. The Question of an Unexpected or Unprecedented Movement is not Here Involved, and if Involved the Jury was not Correctly Instructed on that Phase of the Case.

In that portion of the factual statement devoted to this matter (pp. 13-15, inc., hereof), we have summarized all the evidence on this point. In that portion of this Argument devoted to a discussion of the lack of evidence to support the verdict, we pointed out the total lack of evidence to sustain the allegation that a back up movement of the road engine was unexpected (pp. 37-38, inc., hereof).

The Circuit Court of Appeals held that under this evidence there was no duty on the railroad to give a special warning to Tiller of the back-up movement. Hence, the

question of an unexpected move should not have been submitted to the jury.

Even if a warning was required, we earnestly submit that the only practical warning was given—the automatic bell was continuously rung. We had no way of knowing where Tiller was on the yard. In argument before the Circuit Court of Appeals it was suggested we should have searched for him and warned him by word of mouth. That is preposterous on its face.

This matter should not have been submitted to the jury. But there was further error. The instruction itself did not correctly submit it.

The Court charged as follows on the question of an unusual or unexpected movement (R. 185):

“The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back up movement on the night of March 20th, 1940; that such movement was an unusual and unexpected one and a departure from general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff.”

This instruction is erroneous in that it does not completely instruct the jury on the theory of an unusual movement. One who is injured by an unusual or non-customary movement is not entitled to relief by virtue of that fact alone. The evidence must show that the custom has been established for the benefit of that class of employee or person to which he belongs. We specifically called the attention

of the lower court to this and requested that, if the matter of an unusual movement should be left to the jury, the charge contain mention of this essential feature.

In *C. & O. R. Co. v. Mihas*, 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42, the established law on this subject was laid down. Mihas was an employee engaged in work on and about the tracks. In attempting to climb over a coal car, which was part of a string of standing cars, he was injured when a number of cars were propelled against it by means of a flying switch. Those engaged in the movement had no knowledge of Mihas' position or his movements. The alleged negligence of which complaint was made was that there was an established custom to give notice and warning to all persons in or about standing cars before other cars were shunted against them, and that such notice was not given to Mihas. The evidence, however, showed that warning was given exclusively to persons, not employees, engaged in unloading cars. Judgment for the injured employee was reversed and the Supreme Court held that a directed verdict in favor of the railroad should have been entered. The Court said:

"If there was a violation of a duty, therefore, on the part of the railroad company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant. In *Ches. & O. R. Co. v. Nixon*, 271 U. S. 218, 70 L. Ed. 914, 46 S. Ct. 495, the facts were that a section foreman whose employment obliged him to go over and examine the track, was on a tour of inspection. For that purpose he used a velocipede fitted to the rails. He was overtaken by a train and killed. The negligence charged was that the engineer and foreman of the train were not on the look out; and the proof was to that effect. It was held that that duty was one which the railroad company might owe to others but not towards the class of employees to which the deceased belonged; and a recovery for his death was reversed."

In Fernard v. Boston & M. R. Co., 62 F (2d) 782, the employee was a car inspector. He was standing on one track inspecting cars on an adjacent track when he was struck by a movement taking place on the track on which he was standing. The evidence was conflicting. There was evidence of a custom that cars should not be shunted along a track adjacent to one on which cars were moving, and that this custom was for the benefit of employees making inspections. The District Court instructed simply that, if the custom existed and was violated, and the violation was the proximate cause of the employee's death, the plaintiff was entitled to a verdict. The Circuit Court of Appeals held this to be erroneous, saying:

"But it had no right to return a verdict for the plaintiff, unless he belonged to the class for whose benefit the custom was established, namely, the employees engaged in making running inspection, and unless he was about that business at the time of the accident."

In giving the instruction as worded the District Court relied upon the decision of the Fourth Circuit Court of Appeals in *C. & O. R. Co. v. Peyton*, 253 F. 734. Peyton was working on a coal pier on which two tracks were located. The motor had been running on the North track and the plaintiff introduced evidence tending to show an established custom that employees were notified before the motor changed from one track to the other. He was struck by the motor which had shifted over to the south track. The evidence for the defendant was that the motor ran on either track as occasion required, and there was no custom of giving notice to employees. There was thus a sharp issue in the testimony. Judgment for the plaintiff was sustained.

We have carefully examined the record and briefs in the *Peyton Case* on file in the clerk's office of the Circuit Court of Appeals. In them no mention is made of the necessity that a custom be for the benefit of employees of a class to

which the injured employee belongs, and in the instruction of the District Court in that case no mention of this feature is made, nor in its opinion does the Circuit Court mention that matter. We find nothing, however, in the *Peyton* case inconsistent with that which we have heretofore said. The plaintiff's evidence in the *Peyton* case was of a custom that notice was given to employees working on the pier before the motor changed from one track to the other. Admittedly, if the custom existed, the injured employee who worked on the pier was within the class for whose benefit the custom existed. If the decision of the Circuit Court in the *Peyton* Case is to be construed as meaning that a person injured as the result of violation of custom can recover whether or not he belongs to the class of persons for whom the custom exists, then the *Peyton* case is contrary to the doctrine laid down by the Supreme Court which we believe to be a universal doctrine recognized throughout the country. But, as the point was not raised in that case, and as the custom, if it existed, showed on its face that it existed in part for the injured employee, there was no occasion to raise it.

But that is not the case here. Assuming for the moment that the use of slow siding for a back up movement was violative of custom, there is not a line of evidence to show for whose benefit the custom existed. Tracks exist in order that they may be used, and if one were to speculate, it would be much more logical to suppose that such a custom, if it existed, did exist because of Clopton Road and for the benefit of persons using that Road, than that it existed for the benefit of special railway police whose duties call them everywhere.

5. The Road Engine was being used in "Road Service."

As we have heretofore pointed out (pp. 15-18, inc., and pp. 48-50, inc., hereof), this evidence shows that the road engine was engaged in "road service" and not "yard service". We requested that the Court so instruct, but the Court

left to the jury the determination of the character of service in which the road engine was engaged. At the points in this brief just referred to, we have fully discussed this matter and shall not repeat ourselves.

6. No Statute or Regulation adopted pursuant to Statute required a Light on the Lead End of the Back Up Movement.

We requested that the Court charge that no statute, or regulation adopted pursuant to applicable statute, imposed on the defendant the duty of placing a light of any kind on the lead end of the back up movement. This the Court refused to do. There was involved in this case when it went to the jury a number of statutory or regulatory requirements. The Court saw fit to instruct on features of the Boiler Inspection Act. It also told the jury (R. 186) that:

“To such extent as any statute or regulation promulgated pursuant to statute requires any specific mechanical device or facility, the railroad must furnish it. * * *.”

There had been much evidence on the question of the lighting of yards, and since no statute or regulation requires a railroad to light its yards, the Court specifically so told the jury (R. 186). From beginning to end in this case there was evidence and discussion of lights on the rear end of a back up movement. No statute or regulation, pursuant to statute, requires such a light but when, as in this case, the Court saw fit to instruct on matters required by statute and generally otherwise on matters governed by common law, we were entitled to have the jury told that neither Congress nor the regulatory bodies had ever seen fit to require a light on the lead car of a back up movement. We were entitled to have the jury know what had been made mandatory by statute and what had not.

Judge Cooley in one of his great constitutional decisions, *Twitchell v. Blodgett*, 13 Mich. 127, had occasion to remark

upon the equal importance at times of determining what a matter is and what a matter is not. He said:

“In this view it becomes not less important to determine what the question is *not*, than what it *is*.”

In the instant case it was just as important to advise the jury what was *not* covered by statute and regulation as to advise them what *was* covered thereby.

7. The Court should have Charged that Engineering Questions are left to the Decision of the Railroad and are not reviewable by the Jury.

The plaintiff introduced evidence showing that the tracks at Clopton Yard had the standard Coast Line clearance and that if on one track there was a freight car and adjacent thereto on another track there was a hopper car, the clearance between the two cars is three feet eleven and a half inches. There was much talk of the lighting of the yards. This case was left to the jury to be determined under all the facts and circumstances, one of which was the spacing between tracks, and another was that the Clopton Yard is not lighted by overhead lights. These two engineering facts and particularly that of the spacing of tracks is commented on by the Supreme Court in its former opinion. Since engineering questions of this kind are left to the determination of the railroad and are not reviewable by a jury, we requested that the Court charge that such matters as the space to be maintained between tracks in railroad yards and other engineering questions are left to the decision of the railroad and its decision on such matters is not reviewable by the jury. The Court declined so to instruct. For all we know, the jury may have taken these engineering questions into consideration and reached a conclusion that the railroad could have solved them in a better way than it did solve them.

In *B. & O. R. Co. v. Groeger*, 266 U. S. 521, 69 L. Ed. 419, 45 S. Ct. 169, it is said:

"It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers, will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officials and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end. *Tuttle v. Detroit, etc. R. Co.*, 122 U. S. 194, 30 L. Ed. 1116, 7 S. Ct. 1166; *Richards v. Rough*, 53 Mich. 216, 18 N. W. 785."

In *Delaware, etc. R. Co. v. Koske*, *supra*, it is said:

"There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect to such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries."

8. *The Jury should have been Instructed to Disregard Company Rule 103.*

In the Statement of Fact we discussed this matter at pages 19-20 hereof. The defendant's Rule 103 requires that when cars are pushed by an engine, except when shifting

or making up trains in yards, a trainman must take position on the front of the leading car and when shifting over public crossings at grade not protected by watchmen a member of the crew must protect the crossing.

The evidence conclusively shows that on the back up movement in question a trainman with a lantern was on the front of the leading car when Tiller was struck or up to a point within a few feet of that at which he was struck. The evidence further shows that Clopton Road is not protected by a watchman but that a member of the train crew, Dickens, did protect that crossing. It accordingly developed that this Rule has no relation to this case and the jury should have been so instructed.

9. The Jury should have been Instructed to Disregard Company Rule 24.

At page 20 of the statement of fact we have called attention to defendant's Rule 24 and evidence relating thereto. This rule requires that when cars are pushed by an engine, except when shifting or making up trains in yards, a white light must be displayed on the front of the leading car by night. We have pointed out that in practical construction the rule applies to main line operations. Even if it applies to yards, there was a light at the front of the leading car.

10. If One or More of Several Issues is Erroneously submitted to the Jury, a General Verdict cannot be sustained.

We have discussed this point at length on pages 20-25, inc. of our brief in opposition to the petition for a writ of certiorari, to which we now refer.

CONCLUSION

We accordingly respectfully submit that, because of an entire failure of the evidence to establish negligence and

also to establish the proper chain of causation, the District Court should in this case have directed a verdict. We do not believe it is possible, from a study of the record now before the Court, for any person to specify any act or acts of negligence and support it by the record. If the field of speculation and conjecture may be roamed in at will, and if from that field one is permitted to gather such additional facts as he would like for the record to show, then a finding of negligence could be made, and the law as we know it, i. e. that from the fact of an accident negligence cannot be presumed, is swept into the discard.

We further respectfully submit that, at the least, as found by the Circuit Court of Appeals, there was error in submitting to the jury the questions of the Boiler Inspection Act and of an unexpected movement. In addition, there was error in permitting the plaintiff to amend; in the admission of certain evidence and in the instructions. Any one of these errors, standing alone, would require a new trial.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 335.—OCTOBER TERM, 1944.

Hattie Mae Tiller, Executor of the
Estate of John Lewis Tiller, De-
ceased, Petitioner,
vs.
Atlantic Coast Line Railroad
Company.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Fourth Circuit.

[January 15, 1945.]

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner's husband was killed while in the performance of his duties as an employee of respondent railroad. She filed suit under the Federal Employers Liability Act, 45 U. S. C., Sec. 51 *et seq.*, alleging that her husband's death was caused by the negligent operation of a railroad car which struck and killed him, and because of respondent's failure to provide him a reasonably safe place to work. The District Court directed a verdict in favor of the railroad and the Circuit Court of Appeals affirmed. 128 F. 2d 420. We reversed, holding that there was sufficient evidence of the railroad's negligence to require submission of the case to the jury. *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 68, 73. On remand, petitioner amended her complaint in the District Court, over respondent's objection, by charging that, in addition to the negligence previously alleged, the decedent's death was caused by the railroad's violation of the Federal Boiler Inspection Act, 45 U. S. C., Sec. 22 *et seq.*, and Rules and Regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of that Act. The jury returned a verdict in favor of petitioner, and the District Court refused to set it aside. The Circuit Court of Appeals reversed, 142 F. 2d 718, and certiorari was granted because of the importance of questions involved relating to the administration and enforcement of the Federal Employers Liability Act and the Federal Boiler Inspection Act. 323 U. S. —.

Here, as in the Circuit Court of Appeals, respondent has again argued that the evidence of negligence charged in the original complaint was insufficient to justify submission of the case to the jury. Slight variations in the evidence presented at the two trials are said to require a different conclusion than that which we reached on the first review of this case.

As to this contention of respondent, the Circuit Court of Appeals said on the second appeal that

"Since the evidence at the second trial in respect to the movement of the cars was substantially the same as at the first, this decision [i. e. our decision in 318 U. S. 54] required the District Judge notwithstanding the opposition of the defendant to submit the case to the jury. Our duty upon this appeal to affirm the judgment . . . would have been equally clear if the plaintiff had been content at the second trial to rest upon the legal theory outlined in the opinion of the Supreme Court; but the plaintiff amended the complaint by specifying a new item of negligence which was submitted to the jury as an alternative ground for recovery. Since the verdict for the plaintiff was general and did not specify the ground on which it rested, it becomes necessary for us to determine whether there was sufficient evidence to justify the submission of this new theory to the jury over the defendant's objection."

We reaffirm our previous holding that the evidence justified submission to the jury of the issues raised by the original allegations of negligence.

The Circuit Court of Appeals, however, held that there was no evidence that the alleged violation of the Boiler Inspection Act was "the proximate cause of the accident in whole or in part", and that the District Court should therefore have directed that this issue be found in favor of the railroad. The complaint alleged, in this respect, that the decedent's death was caused by violation of Rules and Regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of the Federal Boiler Inspection Act. That Act broadly authorizes the Commission to prescribe standards "to remove unnecessary peril to life or limb."¹ The complaint alleged a violation of Rule 131 of the Commission, which reads as follows:

"Locomotives used in yard service.—Each locomotive used in yard service between sunset and sunrise shall have two lights, one

¹ *Lilly v. Grand Trunk Western Railroad Co.*, 317 U. S. 481, 486; *United States v. B. & O. R. Co.*, 293 U. S. 454.

located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The locomotive which pushed backwards the string of cars one of which struck and killed the deceased was operated in violation of the literal words of this Regulation. It was being used in "yard service" at respondent's Clopton Yards "between sunset and sunrise." There was no light on the rear of the locomotive, which was moving in reverse towards the deceased.²

It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death. The ruling of the court below that it was not a proximate cause was based on this reasoning: The general railroad practice in yard movements is to push cars attached to the rear of an engine; no express regulation of the Commission prohibits this; in the instant case the cars attached to the engine necessarily would have obscured any light on the rear of that engine; the light so obscured would not have enabled the engineer to see 300 feet backwards so as to avoid injuring the deceased; nor would the light have been visible to the deceased standing at or near the track ahead of the backward movement. Therefore, the court concluded, the failure to furnish the light was not proximately related to the death of Tiller.

Assuming, without deciding, that the railroad could consistently with Rule 131 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light

² The contention is made that since this locomotive was used in road service as well as yard service the Rule should be held inapplicable to it as a matter of law. Such a narrow interpretation of the Regulation would be wholly out of keeping with the liberal construction which we have constantly said must be given to this and the Safety Appliance Act, 45 U. S. C. A., Sec. 1 *et seq.* *Lilly v. Grand Trunk Western Railroad Co., supra*, 486.

We think the court's charge to the jury on this point was consistent with a proper interpretation of the rule. That charge was:

"If the jury believes from the evidence that the road engine, on the night Mr. Tiller was injured, in making the movements it made in said yard was being used by the defendant to classify its cars and make up its train, then the said engine was then being used in yard service. On the other hand, if the jury believes from the evidence that the said road engine was backing into slow siding for the purpose of getting out of the way of the yard engine so that said yard engine could classify cars and make up trains, then said locomotive in making said movement was not being used in yard service."

did not contribute to Tiller's death. The deceased met his death on a dark night, and the diffused rays of a strong headlight even though directly obscured from the front, might easily have spread themselves so that one standing within three car-lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 33. And "The standard of care must be commensurate to the dangers of the business." *Tiller v. Atlantic Coast Line Railroad*, *supra*, 67.

An additional ground of the reversal of this cause by the Circuit Court of Appeals was that part of the District Court's charge to the jury set out in the margin.³ It instructed the jury that if they believed that the back-up movement was an unusual and unexpected one, and a departure from the general practice in making up that particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of that movement and if the jury found that the defendant failed to perform this duty, and that failure was the proximate cause of the injury, its verdict should be for the plaintiff. The original complaint alleged this as one of the grounds of negligence. The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one. Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. We cannot say that a jury could not reasonably find negligence from the evidence which showed such

³ "The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back-up movement on the night of March 20th, 1940; that such movement was an unusual and an unexpected one and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff."

an unprecedented departure from the usual custom and practice in backing cars, without giving "adequate warning of the movement." Compare *Toledo, St. Louis & W. R. R. v. Allen*, 276 U. S. 165, 171.⁴ The charge of the District Court in this respect was correct.

Respondent seeks to support the Circuit Court's reversal of the cause on the ground that the District Court erroneously permitted petitioner to amend her original complaint. The injury occurred March 21, 1940. Suit was filed under the Federal Employers Liability Act on January 17, 1941. (The amendment alleging violation of the Boiler Inspection Act was filed June 1, 1943, which was more than ~~two~~ years after the death. Federal Employers Liability Act, Sec. 6, provides that a suit under that Act must be commenced within ~~two~~ years after injury. The contention is that the ~~two~~ year limitation statute provided in the Federal Employers Liability Act barred the amendment which rested on the Boiler Inspection Act.)

We are of the opinion that the amendment was properly permitted. Section 15(c) of the Federal Rules of Civil Procedure provides that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." The original complaint in this case alleged a failure to provide a proper lookout for deceased, to give him proper warning of the approach of the train, to keep the head car properly lighted, to warn the deceased of an unprecedented and unexpected change in the manner of shifting cars. The amended complaint charged the failure to have the locomotive properly lighted. Both of them related to the same general conduct, transaction and occurrence which involved the death of the deceased. There was therefore no departure. The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased. "The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant." *Maty v. Grasselli Co.*, 303 U. S. 197,

⁴See *Ches. & Ohio Ry. v. De Atley*, 241 U. S. 319; *Ches. & Ohio Ry. v. Peyton*, 253 Fed. 734 (C. C. A. 4); *Ferringer v. Crowley Oil & Mineral Co.*, 122 La. 441; *L. & N. E. Co. v. Asher's Admr.*, 178 Ky. 67; *Dir. Gen'l v. Hubbard's Admr.*, 132 Va. 193; 2 *Shearman & Redfield on Negligence* (rev. ed.), 566, 607; cf. *Davis v. Phila. & R. Ry. Co.*, 276 Fed. 187.

201. There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.⁵

We find no error in the District Court's disposition of the case. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

The CHIEF JUSTICE and Mr. Justice ROBERTS are of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

⁵ See *Friederichsen v. Renard*, 247 U. S. 207; *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62; *United States v. Powell*, 93 F. 2d 788, 790.